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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 46.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

JOHN FISHER, TUTOR, &c., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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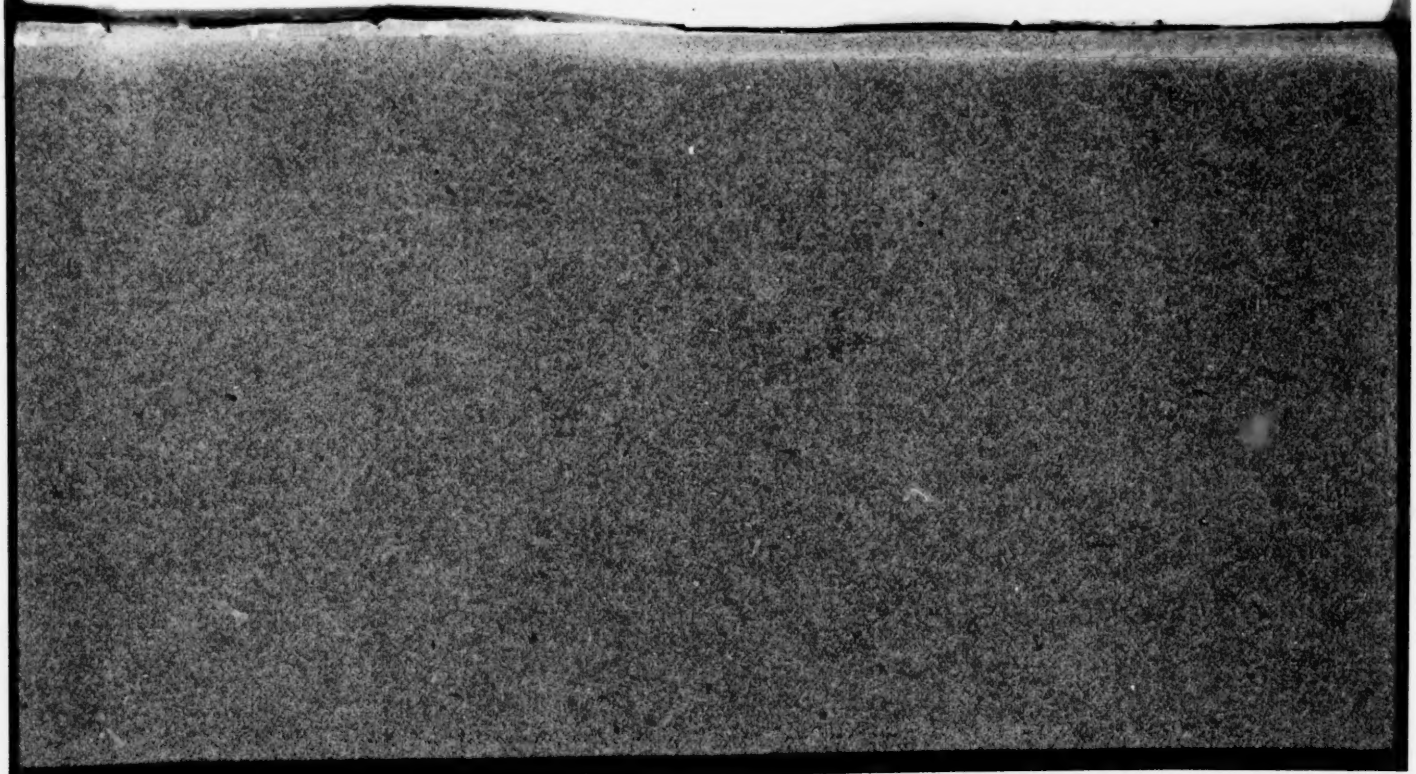

(17,391.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 281.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

JOHN FISHER, TUTOR, &c., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1898, and held in the court-room of said court in the city of New Orleans.

Before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit; the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable Aleck Boarman, United States district judge for the western district of Louisiana.

THE CITY OF NEW ORLEANS
vs.
JOHN FISHER, Tutor, etc., ET ALS. } No. 747.

Be it remembered, that heretofore, to wit, on the 22d day of July, 1898, a transcript of the record of the above-styled cause from the circuit court of the United States for the eastern district of Louisiana, was filed in the office of the clerk of said United States circuit court of appeals, in the words and figures following, to wit:

1 *Bill of Complaint.*

Filed May 11, 1896.

MRS. M. M. FISHER
versus
CITY OF NEW ORLEANS ET AL. } No. 12516.

To the hon. judges of the circuit court of the United States for the eastern district of Louisiana:

Mrs. M. M. Fisher herein joined and authorized by her husband, M. M. Fisher, of Cuba, and citizens of Kingdom of Spain, brings this her bill against the City of New Orleans, a corporation created by the laws of Louisiana and a citizen thereof:

And thereupon your oratrix complains and says:

That she recovered a judgment in this hon. court against the board of school directors, a corporation created by the laws of the State of Louisiana and a citizen thereof, in the sum of more than ten thousand dollars, as more fully appears by the record of said suit;

That your oratrix obtained two other judgments against the same school board, before the civil district court for the parish of Orleans, amounting in the aggregate to many thousand dollars;

That all of said judgments are now final; that they are made payable out of the school taxes levied by the city of New Orleans, prior to 1879.

Your oratrix avers that the school taxes out of which said judgments have been made payable, is a trust fund levied by the city of New Orleans, for the purpose of paying the expenses of the public schools of the city of New Orleans.

1st. That the city of New Orleans has failed to collect the said taxes punctually and that it was through her fault and negligence that the same remains uncollected and by reason of her neglect she has become liable for the amount of taxes yet remaining uncollected.

2nd. Your oratrix further complains and says that said taxes, under the law, carried interest at the rate of ten per cent. per annum and that the city of New Orleans has never paid to the school board any of the interest due on said taxes, but she has misapplied and diverted the same to other unlawful uses.

3rd. Your oratrix further avers that the school board created the obligation against said school taxes, by virtue of contracts which were legally entered into and your oratrix was protected by the Constitution of the United States from any impairment of her contract.

That in violation of this constitutional right, the State of Louisiana passed act 82 of 1884, which directed that the property of delinquent tax-payers should be sold for what it would bring and that all taxes due thereon should by virtue of said sale be cancelled.

That by reason of said law, the city of New Orleans allowed the property on which the school taxes were due to be sold for State taxes, and she caused the city taxes, including the school taxes, to be cancelled; that she was thus guilty, 1st. As a delinquent trustee for not having enforced the collection of the said tax; and 2d. For having failed to protect the interest of your oratrix at said State tax sale; that the cancellations thus made amount to many thousands of dollars.

4th. That the said city of New Orleans at various times passed ordinances cancelling and annulling the said taxes and remitting the interest thereon;

That your oratrix is unable to give the exact amount of each kind of violations of her obligations by the trustee, and it is absolutely necessary to make the city of New Orleans account for the various amounts which have been lost to your oratrix through the unfaithfulness of said trustee.

That the board of school directors to whom the city of New Orleans should account have refused to demand such an account and will continue so to do and your oratrix would be left without a remedy.

That the fund which the city of New Orleans administers seems now to be insufficient to satisfy the demands of all the creditors who are entitled to be paid out of the same.

Your oratrix further avers that her judgments are made directly payable out of the school taxes levied prior to 1879 and she has

an equitable lien there against enforceable before a court of equity.

She further avers that under the law her certificates which are merged in her judgments have been under the law, received by the city of New Orleans, directly in payment of the school taxes without the intervention of the board of school directors.

That for those reasons your oratrix brings her bill against the City of New Orleans and the board of directors of the city schools of New Orleans for an account.

3 Your oratrix brings this bill for herself and all parties similarly situated who are willing to appear and contribute to the costs thereof, they being too numerous to be made parties hereto.

May it please your honors to grant unto your oratrix a writ of subpœna to be directed to the City of New Orleans, through its mayor and to the school board of the city schools of New Orleans, E. B. Kruttschnitt thereby commanding them and each of them, on the first Monday in June, 1896, under the penalties therein to be limited personally to appear before this hon. court then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, abide, perform such further orders, direction and decree that this hon. court may make, and to give a full, fair and perfect account of all the school taxes collected by the city of New Orleans for the years 1873, 1874, 1875, 1876, 1877 and 1878; of all the interest received thereon by said city and never accounted for, of all the taxes which were not collected for want of proper enforcement, and which have since been cancelled both sales made by the State tax collectors and by ordinance adopted by the city council; and your oratrix further prays for all general and particular relief as shall seem agreeable to equity and good conscience.

(Signed) LOUQUE & POMES, *Solicitors.*

Appearance of Defendant.

Extract from Order Book.

JUNE 1ST, 1896.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

The City of New Orleans through S. L. Gilmore, city attorney, has this day entered its appearance to the bill of complaint.

Supplemental Bill.

Filed August 24, 1896.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

To the hon. the circuit court of the United States for the eastern district of Louisiana:

Mrs. M. M. Fisher, duly authorized by her husband, M. M.
4 Fisher, a citizen of the Kingdom of Spain, brings this her supplemental bill against the City of New Orleans, a corporation duly created by the laws of Louisiana, and a citizen of said State, and within the jurisdiction of this hon. court.

Your oratrix avers that the city of New Orleans, has at various times seized for the taxes due, for the years during which her claim arose, a number of houses and lots and has purchased the same, in satisfaction of the taxes due and that a resulting trust has under the law followed the said property and your oratrix is entitled to have the value of said real estate realized upon and the rents accounted for by the city of New Orleans.

Your oratrix is unable to give an exact statement of the houses and property so purchased by the city of New Orleans, but she avers that the same largely exceeds thirty thousand dollars; that said city allows said property to go to waste and your oratrix avers that she has a statutory lien on all of said property under the laws of the United States, and that she is entitled to the appointment of receiver to take charge of same and realize under order of court.

That the acts complained of are contrary to equity and your oratrix has no rights save before the equitable jurisdiction of this hon. court.

Your oratrix brings this, her bill, for her own benefit and for all other persons in her same situation.

May it please your honors to grant unto your oratrix a receiver to take charge of the property purchased by the city of New Orleans for the taxes 1874 to 1879 inclusive, with such powers as receivers generally possess and more especially to be mentioned in the order appointing him and your oratrix further prays that this supplemental bill be filed and that the City of New Orleans through the mayor thereof be ordered to show cause on such day as this hon. court may fix why the prayer herein for receiver should not be granted and your oratrix prays for general relief.

(Signed) LOUQUE & POMES, *Solicitors.*

Chas. Louque being duly sworn says that the facts above mentioned are true and that Mrs. M. M. Fisher is now in the island of Cuba.

(Signed) CHAS. LOUQUE.

Sworn to and subscribed before me this 21st day of August, 1896.

(Signed) WILLIAM ARDILL, *Not. Pub.*

Order.

Let this supplemental bill be filed and let the City of New Orleans show cause on Saturday the 29th of August, 1896, at 11 o'clock a. m., why a receiver should not be appointed as prayed for.

(Signed) CHARLES PARLANGE, *Judge.*

August 22nd, 1896.

On Saturday, Aug. 29, 1896, both parties through counsel appeared before me, and, on motion of defendant, the preliminary hearing was continued to Sept. 5, 1896, on which day the matter was argued by counsel for both parties and by consent the matter of preliminary injunction and receivership was continued without date to be refixed for argument at some future day on motion of either party.

New Orleans, La., Sept. 5th, 1896.

(Signed) CHARLES PARLANGE, *Judge.*

Demurrer to Original Bill.

Filed Aug. 28th, 1896.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

In Equity.

The demurrer of the City of New Orleans, herein appearing by A. Brittin, acting mayor, to the original bill of complaint of Mrs. M. M. Fisher, complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth does demur to said bill and for cause of demurrer shows that complainant has not by her said bill made such a case as entitles her to the relief prayed as to the matters contained in said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in said bill this defendant does demur thereto and prays the judgment of this honorable court whether defendant shall be compelled to make any further or other answer to said bill, and defendant humbly prays to be hence dismissed with her reasonable costs in this behalf sustained.

(Signed) JAMES J. McLOUGHLIN,
Ass't City Attorney, Solicitor for Defendant.

6 *Affidavit.*

UNITED STATES OF AMERICA,
Parish of Orleans, State of Louisiana, City of New Orleans.

A. Brittin, acting mayor of The City of New Orleans, defendant in above-entitled cause, being duly sworn, says that the foregoing demurrer is not interposed for delay.

(Signed) ABRAHAM BRITTIN.

Sworn to and subscribed before me this 27th day of August, 1896.

(Signed) P. ALPH. RABOUIN, *Not. Pub.*

I certify that, in my opinion, the foregoing demurrer is well founded in point of law.

(Signed) JAMES J. McLOUGHLIN, *Of Counsel.*

Entry of Notice of Filing Demurrer.

Extract from Chancery Order Book.

FRIDAY, *August 28th*, 1896.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

The City of New Orleans, through James J. McLoughlin, assistant city attorney, has this day filed a demurrer to the original bill.

Demurrer to Supplemental Bill.

Filed August 28th, 1896.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

In Equity.

The demurrer of the City of New Orleans, herein appearing by A. Brittin, acting mayor, to the supplemental bill of complaint of Mrs. M. M. Fisher, complainant.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill con-
7 tained to be true in such manner and form as the same are therein set forth, does demur to said bill and for cause of demurrer shows that complainant has not by her said bill made such a case as entitles her to the relief prayed as to the matters contained in said bill or any of such matters.

Wherefore and for divers other good causes of demurrer appearing in said bill this defendant does demur thereto and prays

the judgment of this honorable court whether defendant shall be compelled to make any further or other answer to said bill, and defendant humbly prays to be hence dismissed with her reasonable costs in this behalf sustained.

(Signed) JAMES J. McLOUGHLIN,
Ass't City Attorney, Solicitor for Defendant.

Affidavit.

UNITED STATES OF AMERICA,
Parish of Orleans, State of Louisiana, City of New Orleans.

A. Brittin, acting mayor of The City of New Orleans, defendant in above-entitled cause, being duly sworn, says that the foregoing demurrer is not interposed for delay.

(Signed) ABRAHAM BRITTIN.

Sworn to and subscribed before me this 27th day of August, 1896.

(Signed) P. ALPH. RABOUIN, *Not. Pub.*

I certify that, in my opinion, the foregoing demurrer is well founded in point of law.

(Signed) JAMES J. McLOUGHLIN, *Of Counsel.*

Entry of Notice of Filing Demurrer.

Extract from Chancery Order Book.

FRIDAY, *August 28th*, 1896.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

The City of New Orleans through James J. McLoughlin, assistant city attorney, has this day filed a demurrer to the amended bill.

8

Demurrer Set Down for Argument.

Extract from Chancery Order Book.

NOVEMBER 10TH, 1896.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

Now comes Mrs. M. M. Fisher, complainant, through her solicitors, Louque & Pomes, and sets down for argument the demurrer to the original bill and the demurrer to the supplemental bill filed herein.

Order Fixing Demurrers.

Extract from the Minutes.

NEW ORLEANS, MONDAY, *December 14th*, 1896.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, judge.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

On motion of Charles Louque, of counsel for complainant, it is ordered that the demurrer be fixed for trial the 19th day of December, 1896, at 11 a. m.

Hearing and Submission of Demurrer.

Extract from Minutes.

November Term, 1896.

NEW ORLEANS, *January 9th*, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, judge.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

This cause came on to be heard upon the demurrer filed by the defendant.

9 J. J. McLoughlin, assistant city attorney, appearing in support of the demurrer.

Charles Louque for the complainant.

And was argued and submitted—counsel to file briefs.

Pro Confesso against Board of Directors of Public Schools.

Extract from Chancery Order Book.

WEDNESDAY, *January 13th*, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

On motion of Charles Louque, solicitor for complainant, and suggesting that although the board of school directors of the city schools of New Orleans was served with subpœna herein, more than 20 days before the rule day in June, 1896, it has not entered any appearance herein nor filed any demurrer, plea or answer.

It is ordered that the bill of complaint herein be in all things taken for confessed against the said board of school directors of the city schools of New Orleans.

Case Set Down for Further Argument.

Extract from Minutes.

November Term, 1896.

NEW ORLEANS, MONDAY, *February 15th*, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, judge.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

Ordered that this cause be set down for further argument by preference on Saturday, February 20th, 1897, solicitors for both parties being here present in court this day and notified hereof.

Submission of Demurrer.

Extract from Minutes.

November Term, 1896.

NEW ORLEANS, FRIDAY, *February 26th*, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, judge.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

This cause came on this day to be further heard upon the demurrers filed by the City of New Orleans and was argued by the solicitors for the respective parties and submitted, when the court took same under consideration.

Decree Overruling Demurrers.

Extract from Minutes.

November Term, 1896.

NEW ORLEANS, MONDAY, *March 1st*, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, judge.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

This cause came on to be heard at this term upon the demurrers filed by the City of New Orleans to the original and supplemental bills of complaint herein and after argument by the solicitors for the respective parties was submitted.

Whereupon and upon due consideration thereof it is ordered that the said demurrers be and the same are hereby overruled.

11 *Motion for Time to Answer.*

Extract from Minutes.

November Term, 1896.

NEW ORLEANS, WEDNESDAY, *March 3d*, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, judge.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

On motion of Samuel L. Gilmore, city attorney, and James J. McLoughlin, assistant city attorney, solicitors for defendant, and on suggestion to this hon. court that a delay of two weeks is required by counsel for defendant to prepare and file an answer herein—

It is ordered that a delay of ten days be granted defendant within which to file an answer herein.

Answer of City of New Orleans.

Filed March 12th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

The answer of The City of New Orleans, the defendant, to the original and supplemental bills of complaint of Mrs. M. M. Fisher and her husband, complainants.

To the honorable the judges of the United States circuit court for the fifth circuit and eastern district of Louisiana:

This defendant now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors and uncertainties and imperfections in the said bills contained, and not waiving, but especially reserving the rights under the demurrer hereinbefore filed by this defendant herein, for answer to said bills or to so much thereof as this defendant is advised it is material or necessary for it to make answer, answering, says:

I.

Defendant admits that oratrix recovered judgments against
12 the board of school directors, a corporation of the State of Louisiana, and a citizen thereof, both in this honorable court and in the civil district court for the parish of Orleans as is set forth in oratrix's bill of complaint and records annexed thereto and referred to therein.

II.

Defendant admits that all of said judgments are now final and are payable as decreed and provided for in the said judgments.

III.

Defendant denies that the school taxes out of which said judgments have been made payable is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public schools of said city.

IV.

Defendant denies that it has ever failed to collect said taxes punctually, and denies that any of the same remain uncollected, and denies that if any of the same remain uncollected, they so remain by reason of any negligence on the part of this defendant, and denies that defendant is liable at all for the amount of any such taxes yet remaining uncollected, if any such there be.

V.

Defendant admits that the city of New Orleans has never paid to the school board any interest which she may have collested on any back taxes, and defendant denies that any such interest, if same has ever been collected, was due to the school board, and defendant denies that she has ever misapplied or diverted to unlawful uses any interest that she may have collected from delinquent tax-payers or back taxes, and defendant avers and shows that by express provision of law all interest which she may collect on any back taxes is especially set aside for certain purposes and cannot by her be used for school purposes or for any other purpose than that commanded by law.

VI.

Defendant denies that the school board created the obligations against the school taxes, set forth in oratrix'- bill of complaint, by virtue of any contracts legally entered into, and denies that the oratrix has any right to invoke the protection of the Constitution of the United States herein, and denies that the provisions of the same regarding impairment of contract have been in any manner violated by this defendant.

VII.

Defendant denies that act No. 82 of 1884 was passed in violation of any constitutional rights of oratrix in the premises, and
13 defendant declares that whatever was done by the State of Louisiana in passing the said act, if it was done, was within the legislative authority, and the said taxes and legislative provisions were subject to change, amendment and repeal by the same authority which created them, and defendant shows and avers that the city of New Orleans had no authority or control over the action of the legislature in the premises.

VIII.

Defendant denies that the city of New Orleans allowed any property on which school taxes were due, to be sold for said taxes, and denies that she caused the city taxes, including the school taxes, to be cancelled.

IX.

Defendant denies that she has been or is guilty as a delinquent trustee for not having enforced the collection of said taxes, denies that she ever was a trustee in the matter, denies that she ever failed to enforce the collection of any taxes which it was her duty to enforce, denies that it ever was her duty to protect the interests, if any she had, of oratrix, at said tax sales, denies that oratrix had any such interest and denies that there were any such tax sales.

X.

Defendant denies that any cancellations amounting to many thousands of dollars, or to any amount, were made by reason of said sales as set forth in oratrix' bill of complaint.

XI.

Defendant denies that the city of New Orleans passed ordinances cancelling and annulling any taxes, or remitting any interest thereon, but if any taxes were so cancelled or remitted, defendant avers the same was done by authority of law or by judgment of a competent court. Defendant denies that there was or is any obligation on the part of the city to account either to the school board or to the oratrix for any taxes, moneys or appropriations such as are set forth in oratrix' bill of complaint.

XII.

Defendant denies that it was the duty of the school board to call this defendant to account, and denies that the school board or the oratrix herein has any cause of action against this defendant for such an account. Defendant denies that there was any privity between the school board and this defendant, or between Mrs. Fisher and this defendant. And further answering defendant says, that if any such cause of action for an accounting ever did exist
14 in favor of said school board or of said oratrix, the same was effective and executory in the year 1880, and became actionable and exigent in the year 1880, and in the years following the year 1873 up to 1879 inclusive. That said action of accounting was personal to said school board and could only be exercised and availed of by the said school board, which action is prescribed by the lapse of ten years from and after each of the said years, and that oratrix has no right or cause of action in the premises.

XIII.

Defendant denies that there is any fund now administered, or which ever was administered by the city of New Orleans, derived either from appropriations, taxes, or money said to be due said school board, and denies that if there is or was any such fund, that the said school board or oratrix has any rights in the premises.

XIV.

Defendant admits that the judgments of oratrix are payable as stipulated in said judgments, but denies that oratrix has any equitable lien enforceable against the city of New Orleans before a court of equity by reason thereof.

XV.

Defendant denies that under the law were the services which she alleges have been merged in her judgments ever received by the city of New Orleans directly in payment of the school taxes without the intervention of the board of school directors.

XVI.

Defendant denies that the city of New Orleans has at various times for the taxes due for the years during which oratrix' claim is alleged to have arisen, sold for taxes and purchased in satisfaction thereof a number of houses and lots, and particularly, denies that any school taxes are due and payable on any such property, if any such has been bought, and denies that if any such property has been bought, any resulting trust has, under the law, followed said property, and denies that oratrix would in any event, be entitled to have the value of said real estate realized upon, or the rents accounted for by the city of New Orleans.

XVI.

Defendant denies that the city of New Orleans purchased houses and properties, as charged in oratrix' supplemental bill of complaint to the extent of $30,000, or any part thereof.

XVII.

Defendant denies that the city has any property upon which oratrix has any statutory lien under any law of the United
15 States, and denies that she has allowed to go to waste any property of any description which is or has been in her possession, and denies that oratrix is entitled to have a receiver appointed to take charge of any property owned or held by this defendant.

XVIII.

Defendant denies that any acts which have been done by her are contrary to equity and defendant denies that the oratrix has any right or reason to invoke the equitable jurisdiction of this honorable court.

Further answering, defendant shows that there does not appear in the bills of complaint of oratrix herein any allegation of any indebtedness by the city of New Orleans to the said school board, and that without having made said allegation oratrix is without right to proceed against this defendant herein.

Further answering, defendant shows and avers, that it has been decreed in the judgments of oratrix herein sued on, and in other suits of a similar nature, by other parties, against the city of New Orleans, that oratrix and such other complainants have no cause of action against the city of New Orleans on account of the claims of the character sued on in the judgments hereinbefore referred to.

Defendant denies that there is any other matter, cause or thing in the said complainant's original and supplemental bills of complaint, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied; and this defendant, considering the premises aforesaid, humbly prays this honorable court that all the demands contained in the original and supplemental bills of complaint of oratrix herein be rejected and dis-

missed; and defendant humbly prays to be hence dismissed with reasonable costs and charges in its behalf most wrongfully sustained.

And defendant prays for all special, equitable and general relief and orders herein, as this honorable court may deem just, proper and equitable herein.

(Signed) JAMES J. McLOUGHLIN,
Assistant City Attorney, Solicitor for Defendant.
(Signed) W. C. FLOWER, *Mayor.*

Walter C. Flower, being duly sworn, deposes and says that he is mayor of The City of New Orleans, the defendant herein; that he has read the foregoing answer and knows the contents thereof,
16 and that the same is true to his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) W. C. FLOWER, *Mayor.*

Sworn to and subscribed before me this 11th day of March, 1897.
(Signed) P. ALPH. RABOUIN, *Not. Pub.*

Entry of Filing of Answer in Chancery Order Book.

Extract from Chancery Order Book.

FRIDAY, *March 12th*, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

The City of New Orleans through J. J. McLoughlin, solicitor, has this day filed the answer to the original and supplemental bills of complaint.

Motion to Set Aside Pro Confesso as to Board of School — and Order.

Extract from Minutes.

November Term, 1896.

NEW ORLEANS, FRIDAY, *March* 12, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, judge.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

On motion of James J. McLoughlin, assistant city attorney, solicitor for defendants herein, and on suggesting to the court that plaintiff has consented, in writing, to the same,

It is ordered that the *pro confesso* herein entered on the — day of

——, 1896, against the Board of School Directors of the City of New Orleans be set aside and the said school board be allowed to file answer herein.

17 *Rule to Make Reference to Master.*

Filed March 15th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

On motion of Chas. Louque and Emile Pomes, solicitors for complainants and on suggesting to the court that the answers of the defendants have been filed and that this cause should be referred to a master to report thereon, after examining the accounts of defendant The City of New Orleans,

It is ordered by the court that defendant, through J. J. McLoughlin, Esq., their solicitor, do show cause on Saturday, the 20th of March, 1897, at 11 o'clock, why this cause should not be referred to a master of this honorable court to take a full, true, fair and perfect account of all the funds, principal and interest, received by the city of New Orleans from the school taxes levied in 1871—1873—1874—1875—1876—1877 and 1878;—of all interest remitted illegally; or all properties purchased for said taxes as more fully prayed for in the bill and supplemental bill filed herein, and to that effect produce before said master all books, papers, documents to be examined and which may be necessary or proper, in the premises.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., March 15th, 1897, and on the 16th day of March, 1897, I served a true copy of the within rule on the City of New Orleans through J. C. Gilmore, city att'y, by handing the same to him (in) person.

(Signed) J. V. GUILLOTTE,
U. S. Marshal,
By JOHN EARLY.

Answer of School Board.

Filed March 16th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516. In Equity.

To the honorable the judges of the United States circuit court for the fifth circuit and eastern district of Louisiana:

18 Now into this honorable court comes the Board of Directors of the Public Schools of New Orleans, a corporation of the State of Louisiana, and having set aside the *pro confesso* taken by

the oratrix against the respondent, pleads and answers herein to the original and supplemental bills of complaint herein, as follows, to wit:

That it is true oratrix recovered judgments against respondent in this honorable court, and in the civil district court for the parish of Orleans, as stated in her bills of complaint herein, which said judgments are final and executory as decreed therein.

But this respondent denies that the city of New Orleans is indebted to respondent in any manner, form or degree for monies alleged to be due this respondent by the said city for taxes levied for school purposes or for appropriations made by said city for the benefit of respondent or the public schools of New Orleans, prior to and inclusive of the year 1879.

And respondent says that if there should be any moneys, appropriations or taxes due this respondent by the city of New Orleans up to and including the year 1879, for the purpose of carrying on the public schools of this city, respondent denies that any such indebtedness, monies or taxes form a trust fund as alleged and set out in the bills of complaint herein.

And this respondent shows and avers that in regard to all appropriations made by the said city for the benefit of the public schools of New Orleans, and to such taxes as may have been levied according to law by said city for school purposes, that in every respect and in full compliance with her legal obligations the city of New Orleans carried out and executed her said obligations and responsibilities fully in the premises and satisfactorily to this respondent, and this respondent has not today, nor has it ever had, any recourse against the city of New Orleans in the premises.

That there was no necessity at any time for the exercise of any such cause of action against the city of New Orleans, nor was there reason therefor, because, as hereinbefore stated and set forth, and so respondent avers, the city of New Orleans complied faithfully and promptly and satisfactorily with all obligations and responsibilities assumed and contracted by it in the premises aforesaid, up to the year 1879, inclusive, and this respondent avers that the city of New Orleans is not now, nor has it been for over 15 years anterior to January 1, 1897, indebted to this respondent in any manner or to any extent.

And further answering, respondent says, that as to matters and things charged against the city of New Orleans, and to which respondent was not a party, that this respondent is ignorant thereof, and denies on its part any knowledge of or consent to the
19 said matters and things so charged, but this respondent shows and avers that as hereinbefore averred, the city of New Orleans has fully, faithfully and promptly accounted for all such appropriations as may have been made by the said city for the benefit of the public schools of New Orleans, or for monies due or taxes levied up to 1879 inclusive, for such purposes, and it is not true that this respondent has failed or refused to demand such accounting; that as hereinbefore averred, respondent shows that said accounting was unnecessary, because said city promptly and

fully accounted for and paid over to respondent all such appropriations, monies and taxes aforesaid.

And respondent further shows and avers that if any such cause of action of account ever existed, it was effective and executory in the year 1880, and that thereafter, in default of any action taken by this respondent in the premises, said cause of action ceased to exist and become operative after ten years from said date, and that the operation of any such cause of action as now attempted by oratrix, is barred and prescribed by the prescription of ten years.

And further answering, respondent denies that there is any fund, monies, taxes or appropriation out of which the judgments of oratrix can or should be paid, or against which they can be made executory.

And as to all such other matters as have not been specially denied or pleaded to by respondent herein, respondent denies any knowledge thereof and demands strict and full proof thereof.

Wherefore, the premises considered, this respondent prays that its defenses and pleas herein be maintained, and that the bills of complaint of oratrix herein be dismissed, and defendant humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) JAMES J. McLOUGHLIN,
Ass't City Att'y, Solicitor for Respondent.

(Signed) BOARD OF DIRECTORS OF THE PUBLIC SCHOOLS OF THE PARISH OF ORLEANS,
By E. B. KRUTTSCHNITT, *President.*

Oath to the foregoing answer is hereby waived.
New Orleans, March 15th, 1897.

(Signed) CHAS. LOUQUE,
Solicitor for Complainant.

20 *Entry in Chancery Order Book of Filing of Answer.*

Extract from Chancery Order Book.

TUESDAY, *March 16th*, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

The Board of Directors of the Public Schools of New Orleans through Jas. J. McLoughlin, ass't city att'y, solicitor, has this day filed its answer to the original and supplemental bills of complaint herein.

Replication of Complainant.

Filed March 20th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

The replication of Mrs. M. M. Fisher duly authorized by her husband, M. M. Fisher, saving and reserving to herself all and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto saith, that she will aver and prove her said bill to be true, certain and sufficient in law to be answered unto; and that said answers both of The City of New Orleans and of The School Board defendants herein, *is* uncertain, untrue and insufficient to replied unto by this repliant; without this that any other matter or thing whatever in said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct; and she humbly prays, as in and by said bill she hath already prayed.

(Signed) LOUQUE & POMES, *Solicitors.*

Entry in Chancery Book of Filing of Replication.

Extract from Chancery Book.

21 TUESDAY, *March 20th*, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

The complainant herein, through Louque and Pomes, solicitors, has this day filed her replication to the answers of the City of New Orleans and Board of Directors of Public Schools.

Order of Reference to Master.

Entered and filed March 22nd, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

The rule herein taken by complainant for a reference to a master, came up this day for trial—present, Chas. Louque for complainant, J. J. McLoughlin for defendant—when upon consideration thereof, the court ordered said rule to be made absolute, and accordingly that this cause be referred to E. D. Saunders, Esq., as master, to take a full, true, fair and perfect account of all the funds, principal and

interest received by the city of New Orleans from the school taxes levied in 1871, 1873, 1874, 1875, 1876, 1877 and 1878, of all interest remitted illegally, of all properties purchased for said taxes as more fully prayed in the bill and supplemental bill filed herein and to that effect the parties shall produce before said master all books, papers, documents to be examined and which may be necessary or proper in the premises.

New Orleans, La., March 22, 1897.

(Signed) CHARLES PARLANGE, *Judge.*

Petition of F. J. Gasquet.

Filed April 2nd, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

To the honorable circuit court of the United States for the eastern district of Louisiana:

22 The petition of Francis James Gasquet *pro interesse suo;* residing in the city of New Orleans temporarily, and a citizen of the State of New York, respectfully represents:

That your petitioner has obtained a judgment in the State court against the board of directors of the city schools, in the sum of forty-four thousand nine hundred and seventy-eight $\frac{74}{100}$ dollars, with legal interest from Feb'y 25th, 1892, and costs payable out of the school taxes levied by the city of New Orleans prior to 1879, as the whole more fully appears by the duly certified copy of the judgment and record hereto annexed and made part hereof;

That Mrs. M. M. Fisher, a judgment creditor of the school board, has brought her bill for an account of the school taxes against the city of New Orleans for herself and all other persons similarly situated and who are willing to contribute the *pro rata* of costs;

That your petitioner now joins Mrs. Fisher and is willing to contribute his *pro rata* of costs.

Wherefore petitioner prays that he be permitted to file this his petition *pro interesse suo,* and that his claim be referred to the master for adjustment and liquidation and that after a full accounting, that his claim and judgment be paid in full out of the funds accounted and petitioner prays for general relief.

(Signed) LOUQUE & POMES, *Solicitors.*

Order.

Let, as within prayed for, the petition *pro interesse suo* of F. J. Gasquet be filed and let the same be referred to E. D. Saunders, Esq., the master herein, to report to the court.

New Orleans, April 2nd, 1897.

(Signed) CHARLES PARLANGE, *Judge.*

Petition of Jose Venta.

Filed April 2nd, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

To the honorable the circuit court of the United States for the eastern district of Louisiana:

The petition of Jose Venta *pro inter esse suo*, a citizen of the Kingdom of Spain, respectfully represents:

23 That your petitioner has obtained a judgment in the State court against the board of directors of the city schools, in the sum of seventeen thousand and six dollars and twenty-seven cents, with legal interest from May 26th, 1892, and costs, payable out of the school taxes levied by the city of New Orleans prior to 1879 as the whole more fully appears by the duly certified copy of the record and judgment hereto annexed and made part hereof:

That Mrs. Fisher, a judgment creditor of the school board, has brought her bill for an account of the school taxes against the city of New Orleans for herself and other persons similarly situated and who are willing to contribute *pro rata* of costs:

That your petitioner now joins Mrs. Fisher and is willing to contribute his *pro rata* of costs:

Wherefore petitioner prays that he be permitted to file this his petition *pro interesse suo*, and that his claim be referred to the master for adjustment and liquidation and that after a full accounting, that his claim and judgment be paid in full out of the funds accounted and petitioner prays for general relief.

(Signed) LOUQUE & POMES, *Solicitors.*

Order.

Let, as within prays for, the petition *pro interesse suo*, of Jose Venta be filed and let the same be referred to E. D. Saunders, Esq., the master herein, to report to the court.

New Orleans, April 2nd, 1897.

(Signed) CHARLES PARLANGE, *Judge.*

Petition of Mary Quinlan.

Filed May 4th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

To the honorable circuit court of the United States for the eastern district of Louisiana:

The petition of Mary Quinlan *pro interesse suo*, residing in the State of New York and a citizen thereof, respectfully represents:

That your petitioner has filed a suit in the civil district court for the parish of Orleans under No. 53102 against the board of directors of the city schools for the sum of five thousand three hundred
24 and seventy-three dollars and seventy-eight cents, with legal interest from April 28th, 1897, and costs payable out of the school taxes levied by the city of New Orleans prior to 1879 as the whole more fully appears by the record of said suit;

That Mrs. M. M. Fisher, a judgment creditor of the school board, has brought her bill for an account of the school taxes against the city of New Orleans for herself and all other persons similarly situated and who are willing to contribute their *pro rata* of costs;

That your petitioner now joins Mrs. Fisher and is willing to contribute her *pro rata* of costs;

Wherefore petitioner prays that she be permitted to file this her petition *pro interesse suo*, and that her claim be referred to — master for adjustment and liquidation, and that after full accounting that her said claim be paid in full out of the funds accounted, and petitioner prays for general relief.

(Signed) LOUQUE & POMES, *Solicitors.*

Order.

Let, as within prayed for, the petition *pro interesse suo* of Mary Quinlan be filed and let the same be referred to E. D. Saunders, the master herein, to report to the court.

New Orleans, May 4th, 1897.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Petition of Jean Pomes.

Filed May 4th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

To the honorable the circuit court of the United States for the eastern district of Louisiana:

The petition of Jean Pomes *pro interesse suo*, residing in the city of New Orleans and a citizen of Louisiana, respectfully represents:

That your petitioner filed suit for the purpose of recovering judgment against the board of directors of the city schools, for the sum of two thousand two hundred and forty-two dollars and forty-five cents, with legal interest from April 12th, 1897, and costs, payable out of the school taxes levied by the city of New Orleans, prior to 1879, as the whole more fully appears by the record hereto annexed and made (part) hereof.

25 That Mrs. M. M. Fisher, a judgment creditor of the school board, has brought her bill for an account of the school taxes against the city of New Orleans for herself, and all other persons

similarly situated and who are willing to contribute the *pro rata* of costs.

That your petitioner now joins Mrs. Fisher and is willing to contribute his *pro rata* of costs.

Wherefore petitioner prays that he be permitted to file this his petition *pro interesse suo*, and that his claim be referred to the master for adjustment and liquidation and that after full accounting that his said claim be paid in full out of the funds accounted and petitioner prays for general relief.

(Signed) LOUQUE & POMES, *Solicitors.*

Order.

Let, as within prayed for, the petition *pro interesse suo* of Jean Pomes be filed and let the same be referred to E. D. Saunders, the master herein to report to the court.

New Orleans, May 4th, 1897.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Report of Master.

Filed May 22nd, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

Report of E. D. Saunders, master in the above case, under order of reference herein of date March 22nd, 1897.

The order of reference herein of date March 22nd, 1897, directs the master to take a full, true, fair and perfect account,

1st. Of all the funds, principal and interest, received by the city of New Orleans, from the school taxes levied in 1871, 1873, 1874, 1875, 1876, 1877 and 1878.

2nd. Of all interest remitted illegally.

3rd. Of all properties purchased for said taxes.

The complainant herein employed Mr. Stewart, an expert accountant, to go through all the books of the city of New Orleans, containing entries of its collections of taxes and interest thereon, and showing the sums paid by the city to the school board. The city employed Mr. Aitkins to make the same examination on its
26 behalf. The examinations of both of these gentlemen were made independently and with the greatest care and thoroughness, and when completed were compared with each other, though the work extended through many books, covering thousands of items, and involved immense labor, they both reached virtually the same results. Though the difference in the results reached by the gentlemen are comparatively trifling, I have adopted the figures of Mr. Aitkins in the few cases in which there was a slight difference.

The results as shown by the reports of Mr. Stewart and Mr. Aitkins are as follows:

1st. The city of New Orleans owes the school board for the principal of school taxes collected and not paid over from the years 1871 to 1878, both inclusive, the amount of $23,180.03.

2nd. The proportion of the interest actually collected by the city of New Orleans on the taxes of the years 1871 to 1878, both inclusive, up to January 1st, 1897, to which the school board will be entitled, if it is entitled to the same proportion of the interest as of the principal of said taxes, is $48,758.75.

It is a question of law whether the school board is entitled to any part of the interest. I think it is—the interest as a mere accessory of the principal belongs in my opinion to the same person to whom the principal belongs. Accordingly in my opinion the amount the city of New Orleans now owes to the school board for taxes collected, and for interest on the taxes collected, is as above stated, $71,938.78.

3rd. Properties bought in.

The complainant abandoned the attempt to show that the city owed anything on account of properties purchased for taxes.

4th. Interest illegally remitted.

The complainant claims that the city should be further charged with interest on the portion of the taxes accruing to the school-tax fund, whether such interest was actually collected by the city or not. In view of the great length of time that has lapsed and the almost impossibility of proving now whether the interest was collected or not, and in view of the fact that under the assessment-rolls there always is an uncollectable amount of interest, I do not think that the city ought to be charged with the interest which she is not shown to have collected. No evidence of any kind was adduced before me on this subject. It was not shown that any part of the uncollectable interest could have been collected or was illegally remitted. I, therefore, find that the city is not chargeable with the calculated amount of interest not collected.

By agreement of the parties, the fees of the experts herein were fixed at two hundred and fifty dollars ($250.00) to each of
27 them of five hundred dollars ($500) to the two. The bill of R. H. Carter, the stenographer, for evidence taken in this case is $21.50.

I further find that the following parties have proved their claims against the fund herein, by judgments rendered in their favor against the school board, in the civil district court for the parish of Orleans, namely:

M. M. Fisher	$11,094.87
"	8,802.39
"	5,864.64
T. J. Gasquet	57,059.69
Jose Venta	21,297.72

And I annex as part of this report the three reports made by Charles A. Aitkins, marked Exhibits "A," "B," and "C."

I, therefore, respectfully submit the foregoing report under the order of reference to me herein.

(Signed) EUGENE D. SAUNDERS,
Special Master.

28 EXHIBIT "A."

Filed May 22nd, 1897.

NEW ORLEANS, *May 3d*, 1897.

Hon. E. D. Saunders, master in chancery.

DEAR SIR: I beg leave to make the following report of the school taxes collected by the city for the years 1873 to 1878, both inclusive, of school taxes paid over to the school board by the city for the years 1873 to 1878, both inclusive, and of school certificates paid by the city for the years 1874 to 1878, both inclusive; also of school taxes collected by the city from March 2nd, 1876, to December 31st, 1896; also of interest collected by the city on delinquent taxes for the years 1871 to 1878, both inclusive, up to January 24th, 1881.

School taxes collected by the city for the years 1873 to 1878, both inclusive		$1,554,202.38
School taxes paid over to school board by the city for the years 1873 to 1878, both inclusive	$1,477,260.95	
School certificates paid by the city for the years 1874 to 1878, both inclusive	69,991.99	
Total cash and certificates	$1,547,252.94	
Balance due school fund	6,949.44	
	$1,554,202.38	$1,554,202.38

The books of the city treasurer and comptroller show that all the school taxes collected by the city for the years 1871 and 1873 were paid over to the school board up to and including March 2nd, 1876.

Up to that date the city taxes and the school taxes were kept in separate accounts, each being credited with its proportion of all taxes collected.

After that date, the two accounts were merged into one. In order to determine the amount of school taxes included in the city taxes accounts of 1871 and 1873, an itemized account was made up from the books of the city treasurer and comptroller of taxes collected by the city for the years 1871 and 1873 from March 2nd, 1876,
29 up to December 31st, 1896, and the total amounts were apportioned as had been prior to the consolidation of the two accounts.

I examined the account made up by Mr. Stewart and found same to be substantially correct.

As now corrected it is as follows:

Taxes collected by the city for the year 1871 from March 2nd, 1876, up to Dec. 31st, 1896	$76,821.31
Taxes collected by the city for the year 1873 from March 2nd, 1876, up to Dec. 31st, 1896	100,913.09

10.181% of collections for 1871	7,821.17
8⅓% of collections for 1873	8,409.42
Total proportion of school taxes	$16,230.59

There is no account on the city's books showing any credit to the school fund of interest collected on delinquent city taxes, but for your information I submit a statement of all the interest collected on all taxes for the years 1871 to 1878, both inclusive, and at the request of Mr. Louque, I have made up a statement showing what would be the proportion of said interest coming to the school fund for these years if it is determined that this interest forms a part of the amount due the school fund.

Mr. McLoughlin objects to this interest being considered at all, as he claims that the school fund has no right whatever to any proportion of the same.

With this reservation, my calculation is submitted to you.

Year.	Interest collected.	Per cent. school tax.	Proportion of interest on school taxes.
1871	91,669.98	10.181	9,332.81
1873	149,476.15	8⅓	12,456.35
1874	108,165.95	10	10,816.59
1875	60,412.67	10	6,041.26
1876	32,906.24	16⅔	5,484.37
1877	10,588.66	13⅓	1,413.81
1878	9,857.74	13⅓	1,314.38
Total proportion of interest on school taxes			$46,859.57

The interest account for 1873 contains about sixty thousand dollars of interest on collections of delinquent taxes for the year 1871.

As the proportion of school tax was 10.181% for 1871, and 8⅓% for the year 1873, 22% should be added to this amount in order that the proper proportion of interest on the school tax might be obtained.

This would increase the amount of the interest account for the year 1873 by thirteen thousand two hundred dollars, one-twelfth of this amount, or eleven hundred dollars (1,100.00) would be the proportion of that interest coming to the school fund.

Summary.

Amount due school fund on collections for the years 1871 to 1878, both inclusive, as on page 1.....	$6,949.44
Amount due school fund on collections of city taxes for the years 1871 and 1873 from March 2nd, 1876, to Dec. 31st, 1896.....	16,230.59
Total	$23,180.03
Proportion of interest on school taxes for the years 1871 to 1878, both inclusive, as per reservation and calculation on page 3.....	46,859.57
Add amount as on page 3.....	1,100.00
Total	$47,959.57
Grand total.....	$71,139.60

On the books of the city treasurer and treasurer of the school board I found that five thousand one hundred eighteen dollars and sixty-seven cents ($5,118.67) had been paid to the school board in excess of the budget for the year 1879, and that two hundred forty-two dollars and nine cents ($242.09) had been returned to the city on account of this overpayment, leaving a balance of four thousand eight hundred seventy-six dollars and fifty-eight cents ($4,876.58) due by the school board to the city for the year 1879.

Mr. McLoughlin requests me to state that the city claims that this amount should be deducted from the amount $23,180.03 above reported as due by her to the school fund which will reduce the same to eighteen thousand three hundred three dollars and forty-five cents ($18,303.45).

Respectfully submitted.

(Signed) CHAS. A. AITKENS,
Expert Accountant.

31 EXHIBIT "B."

Filed May 22, 1897.

NEW ORLEANS, *May 8th*, 1897.

Hon. E. D. Saunders, master in chancery.

DEAR SIR: I beg leave to make the following supplemental report showing the interest collected by the city on delinquent taxes for the years 1871 to 1878, both inclusive, from January 24th, 1881, up to date, and the proportion thereof coming to the school fund, as per reservation in first report; also a statement of the discounts allowed by the city on school taxes for the years 1873, 1875, 1876, 1877 and 1878.

Year.	Interest collections.	Per cent. school tax.	Proportion of interest on school tax.
1871	195.57	10.181	19.91
1873	33.67	8⅓	2.80
1874	2,095.07	10	209.50
1875	1,862.81	10	186.28
1876	1,017.52	16⅔	169.59
1877	1,270.20	13⅓	169.36
1878	313.06	13⅓	41.74
Total proportion of interest on school taxes			799.18

The statement given in my first report of interest collections, &c., included all the interest collected up to January 24th, 1881.

Amount on sheet 4 first report	47,959.57
Add amount as above	799.18
Grand total	48,758.75

Discount on School Taxes for the Years 1873, 1875, 1876, 1877, *and* 1878.

1873	1,958.50
1875	1,098.61
1876	1,936.39
1877	2,666.81
1878	4,272.96
Total	11,933.27

The books of the city treasurer show that, although a discount was allowed on all taxes paid before a certain date, the school
32 taxes were paid over to the school board in full, and the city lost the interest on those taxes, charging it to the interest account for the year for which the discount was allowed.

This the city paid over to the school board during the years 1873, 1875, 1876, 1877 and 1878, eleven thousand nine hundred thirty-three dollars and twenty-seven cents more than the actual amount of school taxes collected for those years.

There does not appear to have been any discount on taxes for the years 1871 and 1874.

On the city treasurer's ledger I found a memorandum statement showing the amount of discount on school taxes for the year 1878 to

have been four thousand four hundred six dollars and sixty-nine cents ($4,406.69) which was not received back.

This is a little larger than amount given above.

The total discount on all taxes for the year 1875 is also given on the ledger.

From this I am of the opinion that the discount on school taxes for the year 1875 must have been a little larger than amount given above.

Respectfully submitted.

(Signed) CHAS. A. AITKENS,
Expert Accountant.

Entry in Chancery Order Book of Filing Report.

Extract from Chancery Order Book.

SATURDAY, *May 22nd*, 1897.

MRS. M. M. FISHER
vs. } No. 12516.
CITY OF NEW ORLEANS ET AL.

The parties in interest are hereby notified that E. D. Saunders, special master herein, has this day filed his report in this cause.

Motion to Make Board of Liquidation Party.

Entered and filed May 27th, 1897.

MRS. M. M. FISHER
vs. } No. 12516.
CITY OF NEW ORLEANS.

33 In Equity.

On motion of James J. McLoughlin, assistant city attorney, solicitor for defendants, and on suggesting to the court that he is of opinion that The Board of Liquidation of the City Debt of New Orleans, a corporation created and organized under the laws of Louisiana, and a citizen of the State of Louisiana and domiciled in the city of New Orleans, is a necessary party to this suit, and should be made a party hereto,

It is ordered that The Board of Liquidation of the City Debt of New Orleans, aforesaid, be made a party hereto, and be notified hereof and cited to appear and answer and defend its interest, if any, herein.

Service accepted without waiving any rights.

(Signed) LOUQUE & POMES, *Solicitors.*

Marshal's Return.

Received by U. S. marshal, New Orleans, La., May 28th, 1897, and on the 29th day of May, 1897, I served a true copy of the

within motion on the Board of Liquidation through R. M. Walmsley, president thereof, by handing the same to him in person in the city of New Orleans, La.

(Signed) J. V. GUILLOTTE,
U. S. Marshal,
By JOHN EARLY.

Circuit Court of the U. S. for the Eastern District of Louisiana.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

Exception- to Master's Report.

Filed May 31st, 1897.

Exceptions taken by Mrs. M. M. Fisher, F. J. Gasquet, and Joseph Venta to the report of E. D. Saunders, master in chancery *pro hac vice*, to whom this cause stood referred by the decree heretofore made herein.

First exception. That the master failed to reserve the rights of these plaintiffs and interveners to the interest money collected by the city of New Orleans for the school fund since January, 1881;

34 Your exceptors aver that in the bill of complaint herein it was averred that the city of New Orleans had remitted a large amount of interest to the tax-payers and an attempt was made to hold the said city liable for said interest which it was averred was illegally remitted;

That on an examination of the accounts your exceptors discovered that the greatest deficit came not from the interest illegally remitted, but from a contract made by the city of New Orleans in 1881 with the civil sheriff by virtue of which all the interest accrued on the taxes was given and allowed to the sheriff as a part consideration of his services;

That the city of New Orleans had no power or right under the constitution to increase the compensation of any officer, and said contract was *ultra vires* as trustee and not binding on the *cestui que trust;*

That your exceptors were delayed already so long by litigation in the enforcement of their claim that they preferred that their right to further accounting should be reserved, than to file a supplemental bill with the permission of this hon. court; that therefore the rights of your exceptors to a further accounting on that head should have been reserved by the master and should be so now reserved by this hon. court.

Second exception. Your exceptors aver that they found it extremely difficult and a work of great magnitude to arrive at the properties purchased by the city for the taxes and for the time

being your exceptors were not able to get at the correct description of said properties;

That the officers of New Orleans are busy with the regular duties, and your exceptors did not deem it expedient at the present junction to enforce their rights to an account of said properties, and their rights should be reserved.

Third exception. That the master failed to allow any interest on the moneys received by the city of New Orleans from the time the same was payable;

That your exceptors are entitled to interest with an annual rest according to the rules and principles of equity and jurisprudence; but they will content themselves with simple interest reserving their rights to a further account when found necessary;

Therefore the said exceptors do except to the said report and appeal therefrom to the judgment of this hon. court, and in other respects your exceptors pray that the report of the master be approved and that a decree be rendered accordingly and they further pray for general relief.

(Signed) LOUQUE & POMES, *Solicitors.*

35 *Motion to Fix Exceptions and Final Hearing.*

Entered and filed May 31st, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

On motion of Louque & Pomes, solicitors for complainant and interveners, and on suggestion to the court that they have filed exceptions to the master's report herein and on further suggestion that this cause now stands ready for final hearing:

It is ordered by the court that J. J. McLoughlin, Esq., solicitor for defendant, be now notified that the exceptions to the master's report and final hearing are fixed for trial on Saturday, the 5th of June, 1897, at 11 o'clock a. m.

Petition of Mrs. A. B. Gage.

Filed June 5, 1897.

United States Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

The petition of intervention of Mrs. Mary A. B. Gage (born Mary A. B. Gower), and widow of Moses W. Gage, deceased, residing in the State of Maine, and a citizen of said State, respectfully shows:

That your petitioner has obtained a judgment in the civil district court for the parish of Orleans against the Board of Directors of the

City Schools of New Orleans in the sum of five hundred and fifteen $\frac{44}{100}$ dollars (515.44), with legal interest thereon from November 30, 1887, until paid, and all costs, payable out of the school tax levied prior to the year 1879—as the whole more fully appears by a duly certified copy of said judgment hereto annexed and made part hereof.

That Mrs. M. M. Fisher, a judgment creditor of the school board, has brought her bill for an account of the school tax against the City of New Orleans for herself and all others similarly situated and interested, who are willing to contribute to the *pro rata* of
36 costs herein. That your petitioner desires to join the said Mrs. M. M. Fisher, complainant, and is willing to contribute her *pro rata* of costs and expenses incurred.

Wherefore, petitioner prays that she be permitted to file this her petition of intervention, *pro interesse suo*, and that her claim be referred to the master for adjustment and liquidation, and after a full account that her claim and judgment be paid out of the school tax levied prior to the year 1879.

And she prays for general and equitable relief, and as in duty bound she will ever continue to pray.

(Signed) E. HOWARD McCALEB, *Solicitor*.

Order.

Let the foregoing petition of intervention be filed and referred to E. D. Saunders, Esq., master herein, for examination and report.

(Signed) CHARLES PARLANGE, *Judge*.

Exceptions of City of New Orleans to Report of Master.

Filed June 7th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

Defendant excepts to that part of the report of the master wherein he expresses his opinion that the interest on taxes is a mere accessory of the principal, and belongs to the person to whom the principal belongs, and that, therefore, in his opinion, the City of New Orleans owes the school board for taxes collected and interest collected. Exceptor excepts to this on the ground that:

1st. It was no part of the master's duty, under his reference, to decide this question or to express any opinion upon the question of law involved therein, but in the event that the court overrules this exception and holds that such was his duty, then and in that case the City of New Orleans excepts to his conclusions of law, and asserts that, on the contrary, his conclusion is erroneous; that the interest does not follow the taxes, and does not belong to the party to whom the taxes belong.

Defendant excepts to the statement of the master that the amount

reported as collected out of the school taxes from 1871 to 1878, inclusive, is due by the city to the school board or to the board
37 of liquidation at any time since its collection.

Wherefore defendant prays that these exceptions be maintained, and that the master's report be amended accordingly.

And for general relief.

(Signed) JAMES J. McLOUGHLIN,
Ass't City Att'y, Solicitor for City of New Orleans.

Demurrer of the Board of Liquidation of the City Debt.

Filed June 19th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

Demurrer of the Board of Liquidation of the City Debt, ordered to be made a party herein.

The Board of Liquidation of the City Debt, not confessing or acknowledging any right of defendant to make it a party hereto, nor confessing or acknowledging any of the matters or things at issue herein between the plaintiff and the defendant, whether set up in the bill, demurrer, pleas or answers, says:

That it cannot be made a party to this suit in manner and form as attempted by defendant; that it has no interest in this litigation; that if such were not the fact, appearer could not be made a party to this suit save by service of the bill of complaint and answers to the pleadings herein, or by citation or subpœna in chancery.

That knowledge of the issues between complainant and defendant has not been brought to it in any manner known to the law; that in the order herein made May 22nd, 1897, making it a party hereto, there is no prayer for a decree against appearer, or any prayer for citation or subpœna in chancery, nor does it appear for what purpose appearer is to be made a party to this suit.

That the so-called pleading, consisting solely of the said order of May 22nd, 1897, is insufficient in law or equity to make appearer a party to this suit, and that it desires to be hence dismissed.

Wherefore, and for other errors and defects in the proceedings by which appearer is sought to be made a party, and to be brought into this suit, appearing in the face of the record, this appearer does demur to the whole of the same, and humbly prays for
38 a judgment of this honorable court, whether it be compellable or ought to make any plea or answer herein otherwise than is hereby done; and appearer humbly prays to be hence dismissed, with costs and charges in this behalf most wrongfully sustained.

(Signed) BRANCH K. MILLER,
Solicitors of the Board of Liquidation of City Debt.

I hereby certify that it is my opinion that the above demurrer is well founded in law.

(Signed) BRANCH K. MILLER,
Solicitor for the Board of Liquidation of City Debt.

Personally came and appeared, Robert M. Walms-ey, president of the Board of Liquidation of the City Debt, who being duly sworn, deposes and says, that he is president of the said board, and that the said demurrer is not *imposed* for delay.

(Signed) R. M. WALMSLEY, *Pres't.*

Sworn and subscribed before me on this the 19th of June, 1897.

(Signed) J. C. HENRIQUES,
Notary Public.

Order Continuing Cause for the Term.

Extract from Minutes.

April Term, 1897.

NEW ORLEANS, SATURDAY, *June 19th*, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, judge.

On motion of counsel for defendant and of counsel for Mrs. Gage, intervener, it is ordered that this cause be continued for the term.

Exceptions of Mrs. A. B. Gage to Master's Report.

Filed June 21st, 1897.

Fifth Circuit. In Equity.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

39 *Exceptions of Mrs. Mary A. B. Gage to the Report of E. D. Saunders, Master, on File Herein.*

1. This exceptor having filed an intervention in this cause, excepts to that portion of the report allowing to Mrs. M. M. Fisher, T. J. Gasquet and Jose Venta the entire fund collected by the City of New Orleans, and for which she is chargeable. That this exceptor has the right, also, to participate in the distribution of said fund *pro rata* with the parties above named.

2nd. That the complainant and T. J. Gasquet and Jose Venta, have no right to appropriate the whole of said fund to the discharge of their judgments, and that it is the duty of the City of New Orleans to call in all parties holding school certificates for the years 1876, 1877 and 1878 to participate in the distribution of the amount

collected by the City of New Orleans, and owing to the school board for said taxes so collected, and the interest thereon, as stated in said master's report.

Wherefore, intervener and exceptor prays that these exceptions be maintained, and that the master's report be reformed and amended accordingly, and for general relief.

(Signed) E. HOWARD McCALEB,
Att'y for Exceptor, Intervener.

Motion to Fix Exception.

Filed June 28th, 1897.

MRS. M. M. FISHER *vs.* CITY OF NEW ORLEANS. } No. 12516.

On motion of Charles Louque, solicitor for complainant, it is ordered that the exceptions to the master's report and demurrer herein be fixed for trial *for* on Thursday, the 1st day of July, 1897, at 11 o'clock, a. m., and that the City of New Orleans, E. Howard McCaleb, solicitor for Mrs. Gage, and Branch K. Miller, solicitor for the Board of Liquidation, be notified hereof.

Exception to Jurisdiction of the Court.

Filed June 29th, 1897.

(Stricken from the files Dec. 20, 1897.)

40 MRS. M. M. FISHER *vs.* CITY OF NEW ORLEANS. } No. 12516.

Now into court comes the City of New Orleans and excepts to the jurisdiction of the court *ratione materiæ et personæ:*

Defendant shows that Mrs. M. M. Fisher is a citizen of New Orleans and of the State of Louisiana.

That plaintiff's petition contains no averment that the suit could have been maintained by the assignors of the claim sued upon by Mrs. M. M. Fisher in the suit which forms the basis of this action.

Wherefore, exceptor prays that this exception be maintained, and that plaintiff's suit be dismissed at her cost; for all necessary orders in the premises, and for general relief.

(Signed) J. J. McLOUGHLIN AND
W. B. SOMERVILLE,
Ass't City Attorneys and Solicitors for Defendant.

Plea in Abatement.

Filed July 1st, 1897.

(Stricken from the files Dec. 20, 1897.)

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET ALS. } No. 12516.

The plea of the above-named defendants, The City of New Orleans, through A. Brittin, acting mayor, to the original bill and the supplemental bill of the above-named plaintiff, Mrs. M. M. Fisher.

This defendant, The City of New Orleans, by protestation, not confessing all or any of the matters and things in the said complainant's bills contained to be true in such manner and form as the same are therein set forth, does plead to the jurisdiction of the court in this cause on the ground that complainant, Mrs. M. M. Fisher, is a citizen of the State of Louisiana, and is residing in the city of New Orleans, at No. 2335 Chippewa street; that plaintiff, Mrs. M. M. Fisher, and defendant, are both citizens of the State of Louisiana, and that by reason thereof this court is without
41 jurisdiction *ratione personæ*. That the civil district court for the parish of Orleans is the only court competent to adjudicate upon the contest between plaintiff and defendant. That the matters above offered are relied upon as an objection or bar to this suit.

Wherefore, defendant prays *that* judgment of the court whether it ought to be compelled further to answer the bill of plaintiff filed herein, and that this suit be abated and dismissed at plaintiff's costs.

(Signed) W. B. SOMERVILLE,
Solicitor for Defendant.

Abraham Brittin, acting mayor of The City of New Orleans, defendant in above-entitled cause, being duly sworn, says that the foregoing plea is not interposed for delay; that Mrs. M. M. Fisher was before her marriage a resident of this city, in her father's house, and that she is now residing in this city, at No. 2335 Chippewa street; and affiant is informed and believes that Mrs. M. M. Fisher is a native of the city of New Orleans, State of Louisiana.

(Signed) ABRAHAM BRITTIN,
Acting Mayor.

Sworn to and subscribed before me this 1st day of July, 1897.

(Signed) P. ALPH. RABOUIN,
Notary Public.

Order Fixing Exceptions.

Extract from Minutes.

November Term, 1897.

NEW ORLEANS, MONDAY, *November 29th*, 1897.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, judge.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

In this cause it is ordered that the exceptions to the master's report be fixed for December 4th, 1897, at 11 a. m., on the motion of C. Louque, attorney for plaintiff.

42 *Intervention of U. Koen.*

Filed Dec. 4th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

The petition of intervention of Urban Koen, of New Orleans, State of Louisiana, who is a citizen of the said State of Louisiana, respectfully shows:

That your petitioner has obtained a judgment in the civil district court for the parish of Orleans against The Board of Directors of the City Schools of New Orleans, No. 53833 of the docket of said court, division "D," in the sum of twenty-two thousand nine hundred and ninety-one $\frac{7}{100}$ dollars and all costs, payable out of the school tax levied prior to 1879—as the whole more fully appears by a duly certified copy of said judgment hereto annexed and made part hereof.

That Mrs. M. M. Fisher, a judgment creditor of the school board, has brought her bill for an account of the school tax against the City of New Orleans for herself and all others similarly situated and interested, who are willing to contribute to the *pro rata* of costs herein. That your petitioner desires to join the said Mrs. M. M. Fisher, complainant, and is willing to contribute his *pro rata* of the costs and expenses incurred.

Wherefore, petitioner prays that he be permitted to file this his petition of intervention, *pro interesse suo*, and that his claim be referred to the master for adjustment and liquidation, and after a full account that his claim and judgment be paid out of the school tax levied prior to the year 1879 and for costs and general relief.

(Signed) E. HOWARD McCALEB,
Solicitor for Intervener.

Civil District Court for the Parish of Orleans, City of New Orleans, State of Louisiana.

URBAN KOEN
vs.
BOARD OF SCHOOL DIRECTORS OF THE Public School- of the City of New Orleans. } No. 53833, Division " D."

43 *Judgment.*

This cause came on this 24th day of November, 1897, for trial.

Present: E. Howard McCaleb, Esq., attorney for plaintiff; J. J. McLoughlin, assistant city attorney, for defendant.

When after hearing pleadings, evidence and counsel, and for the reasons orally assigned, the court considering the law and the evidence to be in favor of the plaintiff and against the defendant—

It is ordered, adjudged and decreed that the plaintiff, Urban Koen, do have and recover judgment against The Board of Directors of the Public Schools of the City of New Orleans for the sum of twenty-two thousand nine hundred and ninety-one 7/100 dollars ($22,991.07) *dollars*, payable out of the school tax levied prior to the year 1879 by the city of New Orleans.

And costs of court.

Judgment rendered November 24, 1897.

Judgment signed December 1st, 1897.

(Signed) N. H. RIGHTOR.

A true copy.

(Signed) LOUIS BURTHE, *D'y Clerk.*

The reference to a master is waived and it is admitted that the intervener is entitled to participate in the fund, if any be distributed.

New Orleans, Dec. 3, '97.

(Signed) CHAS. LOUQUE,
Solicitor for Complainant and Intervener.

Reference waived, correctness of judgment admitted, and intervener permitted to become party to suit. All other defenses reserved.

(Signed) JAMES J. McLOUGHLIN,
Ass't City Att'y, for City of New Orleans.

Order.

Let this intervention be filed *nunc pro tunc* as of December 4th, 1897.

December 20th, 1897.

(Signed) CHAS. PARLANGE, *Judge.*

44 *Order: Case Continued to Dec. 11th, 1897.*

Extract from Minutes.

NEW ORLEANS, SATURDAY, *December 4th*, 1897.

Court met pursuant to adjournment.

Present: Hon. Don A. Pardee, circuit judge.

On motion of counsel for the parties herein, it is ordered that this cause be continued to Saturday, December 11th, 1897, at 11 a. m. to be heard on the exceptions to the master's report.

Report on Intervention of Mrs. A. B. Gage.

Filed Dec. 10th, 1897.

MRS. M. M. FISHER *vs.* CITY OF NEW ORLEANS. } No. 12516.

Report of the master on the intervention of Mrs. A. B. Gage, widow of Moses W. Gage.

It is shown by a certified copy of the civil district court, rendered in the suit of Mrs. Mary A. B. Gage, *vs.* The Board of Directors of the Public Schools, *et al.*, on December 1st, 1893, that the intervener herein has recovered judgment against The Board of Directors of the City Schools of New Orleans, for the sum of five hundred and fifteen dollars and forty-four cents ($515.44), with legal interest thereon from November 30th, 1887, until paid, and all costs of suit, the whole payable out of the school tax levied prior to the year 1879 by the General Assembly of the State; the copy of judgment above referred to is offered on behalf of the intervener herein, as an exhibit to her petition of intervention, and it is also offered as a part of this report.

As there is no dispute about the facts, I accordingly find and report that Mrs. Mary A. E. Gage has recovered a judgment against The Board of Directors of the City Schools of New Orleans, for the sum of five hundred and fifteen dollars and forty-four cents, with legal interest thereon from November 30th, 1887, until paid and all costs of suit, the whole payable out of the school tax levied prior to the year 1879 by the General Assembly of this State.

Accordingly I further find that said intervener is entitled
45 to *pro rata* on her said judgment in such funds as may be recovered in these proceedings for the school tax levied prior to the year 1879 by the General Assembly of the State of Louisiana.

Dec. 9, 1897.

(Signed) E. D. SAUNDERS.
Special Master.

Order Sustaining Demurrer of Board of Liquidation.

Extract from Minutes.

NEW ORLEANS, SATURDAY, *December 11th*, 1897.

Present: Hon. Don A. Pardee, circuit judge.
Present: Hon. Charles Parlange, district judge.
Court met pursuant to adjournment.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

The demurrer herein filed by the Board of Liquidation June 19th, 1897, to the order obtained by the defendant making said board a party to this suit, came on this day for hearing.

Present: Branch K. Miller for demurrer.

Present: J. J. McLoughlin for City of New Orleans, and was argued, whereupon it was ordered that the demurrer be sustained and the Board of Liquidation be dismissed from this suit.

Motion of City and Order of Continuance.

Extract from Minutes.

NEW ORLEANS, SATURDAY, *December 11th*, 1897.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.
Present: Hon. Charles Parlange, district judge.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

On motion of J. J. McLoughlin assistant city attorney of
46 counsel for defendant suggesting that he desires a continuance herein, it is ordered that the hearing of the exceptions to the master's report be continued to Friday, December 17th, 1897, counsel for all parties being present and taking notice.

Petition of Pomes et als., Interveners.

Filed Dec. 13th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

To the hon. the circuit court of the United States for the eastern district of Louisiana:

The petition *pro interesse suum* of Jean Pomes, Mary Quinlan, Marie Fortier, duly authorized by her husband, Georgiana T. Young,

Lizzie G. Wheelright, Mary A. Sullivan, Francis Johnson, respectively represents:

That your petitioners have each obtained a final judgment before the civil district court for the parish of Orleans for the respective sums of $6,315.73 + 50.00; $5,373.75 + —; 32.19 + 5.00; $305.34; $155.88; 155.88; $36.02 + 10.00 against The Board of Directors of the City Schools for the Parish of Orleans, payable out of the school taxes levied by the city of New Orleans prior to 1879, as the whole more fully appears by the copies of judgments hereto annexed and made part hereof.

That Mrs. M. M. Fisher has filed a bill in this hon. court, claiming an account from the city of New Orleans and that a reference has been ordered and the master has made his report.

That your petitioners are desirous of intervening herein and of joining the complainant and of paying their share of expenses.

That their petition should be referred to a master to report upon the va-idity of their claims and petitioners pray that they be allowed to intervene for their own interest and permitted to join the complainant herein and they pray for general relief, &c.

(Signed) CHAS. LOUQUE.

Reference to the master waived and it is admitted that the judgments claimed are correct.

New Orleans, December 8th, 1897.

(Signed) E. HOWARD McCALEB,
Att'y for Mrs. M. A. B. Gage and U. Koen, Interveners.

(Signed) JAMES J. McLOUGHLIN,
Ass't City Att'y, Reserving All Defenses.

47 *Order.*

Let this petition of intervention be filed *nunc pro tunc* as of Dec. 13th, 1897.

(Signed) CHARLES PARLANGE,
U. S. Judge.

New Orleans, Dec. 20th, 1897.

Rule to Strike Out Certain Papers.

Filed Dec. 13th, 1897.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

On motion of Chas. Louque, solicitor for complainant, and on suggestion to the court that the two papers filed in this cause, and styled "exception to the jurisdiction of the court *ratione materiæ et personæ*," and plea in abatement are irregular and do not comply with the requirements of the equity rules, that said documents were not filed at the time required by said rules and are irregular.

It is ordered by the court that the defendant show cause on Friday, the 17th of Dec., 1897, at 11 o'clock a. m., why they should not be taken off the files.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Dec. 14th, 1897, and on the same day I served copy hereof on the City of New Orleans, La., by handing same to Hon. Walter C. Flower, mayor, in person, at the city hall.

(Signed) J. V. GUILLOTTE,
U. S. Marshal,
By JOHN EARLY,
Deputy Marshal.

48 *Petition of Intervention of Edward F. Duclaux.*

Filed Dec. 20, 1897.

United States Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

The petition of intervention of Edward F. Duclaux, of New Orleans, State of Louisiana, a citizen of said State, with respect shows:

That petitioner has obtained a final judgment in the civil district court for the parish of Orleans against The Board of School Directors of the City of New Orleans, No. 43557 of the docket of said court, division "B," in the sum of two thousand and ninety $\frac{17}{100}$ dollars ($2,090.17), and costs, payable out of the school taxes for the years prior to 1879, as will more fully appear from a duly certified copy of said judgment annexed hereto and made part hereof.

That Mrs. M. M. Fisher, a judgment creditor of the said school board, has brought a bill in this hon. court for an account of the school tax, against the city of New Orleans, for herself and for all others similarly situated and interested, who are willing to contribute their share of costs, *pro rata.*

That a reference has been ordered, and the master has made his report.

That your petitioner desires to intervene herein and join the complainant, and is willing to pay his share, *pro rata,* of the expenses and costs.

Wherefore, petitioner prays that he be permitted to file this his petition of intervention *pro interesse suo,* and that his claim be referred to the master for adjustment and liquidation, and, after a full account, that his claim and judgment be paid out of the school taxes levied prior to the year 1879; and for costs, and for general relief.

(Signed) CHAS. J. THEARD,
Solicitor for Intervener.

Reference to the master waived, and it is admitted that the
49 judgment claimed is correct and that intervener is entitled to participate in the fund, if any, to be distributed.

New Orleans, Dec. 17th, 1897.

(Signed) CHAS. LOUQUE,
Solicitor for Compl't and Interveners.

All rights reserved.

(Signed) JAMES J. McLAUGHLIN,
Ass't City Att'y.

(Signed) E. HOWARD McCALEB,
Solicitor for Mrs. Gage and U. Koen, Interveners.

Let this petition of intervention be filed.

(Signed) CHARLES PARLANGE, *Judge.*

N. O., Dec. 20, 1897.

Plea of Defendants to Original and Supplemental Bills of Complaint.

Presented in open court Dec. 20, 1897, and leave to file refused.

United States Circuit Court for the Eastern District of La.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516. In Equity.

The plea of the above-named defendants, The City of New Orleans, through Walter C. Flower, mayor, to the original bill and supplemental bill of the above-named complainant, Mrs. M. M. Fisher.

This defendant, The City of New Orleans, by protestation, not confessing all or any of the matters or things in the said complainant's bills contained, to be true in such manner or form, as therein set forth, does plead to the jurisdiction of the court in this cause on the ground that complainant, Mrs. M. M. Fisher, is a citizen of the State of Louisiana, and is residing in the city of New Orleans, at No. 2335 Chippewa street; that complainant, Mrs. M. M. Fisher was a citizen of the State of Louisiana at the time that she instituted her original suit, No. 12060, in this honorable court; that she has continuously remained a citizen of Louisiana ever since that time, and was such at the time of the institution of the present proceedings, and is now.

That defendant did not discover these facts until after exceptions had been filed by defendant to the master's report herein;
50 that defendant had made due and diligent search to discover these facts, through the Secretary of State of the United States in Washington, and through the consul general of the United States, in Havana, Cuba; that complainant Mrs. M. M. Fisher, and defendant, are both citizens of the State of Louisiana, and that by reason thereof this court is without jurisdiction *ratione personæ*. That the

civil district court for the parish of Orleans is the only court competent to adjudicate upon the contest between complainant and defendant.

That in filing suit No. 12060, and in filing this present suit complainant claimed to be a subject of Spain; she did so for the purpose of acquiring jurisdiction herein, by a fraud upon the court; that by inducing this defendant to demur herein, and to answer herein—this defendant being at the time ignorant of the fact, that complainant was practicing and had practised a fraud upon this honorable court, to obtain jurisdiction herein—defendant was misled by the said fraud and misrepresentation of the complainant; and equity requires that this defendant be permitted to withdraw or treat as withdrawn, the demurrer and answers heretofore herein filed by defendant, and to file now this plea to the jurisdiction of the court.

Wherefore, defendant prays the judgment of the court that it be permitted to withdraw or treat as withdrawn, the demurrer and answers hereinbefore filed by it, and that this plea be filed and this court judge whether defendant ought to be compelled further to answer the bill and supplemental bill of complainant filed herein, and that this suit be abated and dismissed at complainant's costs.

(Signed) JAMES J. McLOUGHLIN,
Ass't City Att'y, Solicitor for Defendant.
(Signed) W. C. FLOWER, *Mayor.*

I, the undersigned solicitor for the defendant, hereby certify that in my opinion the foregoing plea is good in law.

(Signed) JAMES J. McLOUGHLIN,
Ass't City Att'y, Solicitor for Defendant.

Walter C. Flower, mayor of The City of New Orleans, defendant in above-entitled cause, being duly sworn, deposes and says that the foregoing plea is not interposed for delay; that Mrs. M. M. Fisher was, at the time of the institution of suit No. 12060 in this honorable court, a citizen of Louisiana; that she has remained such continuously since; that she was a citizen of Louisiana at the time this present suit No. 12516 was instituted; that she is now residing in this city, at No. 2335 Chippewa street at her father's house; that affiant is informed and believes that Mrs. M. M. Fisher, her husband and her parents are all citizens of the State of
51 Louisiana, and were such at the time of the institution of the present suit.

Affiant further swears that these facts were not known to him, until after the filing of the exceptions to the master's report herein, notwithstanding that affiant has made due and diligent search and investigation for the purpose of discovering the same.

(Signed) W. C. FLOWER, *Mayor.*

Sworn to and subscribed before me this 17th day of December, 1897.

[SEAL.] (Signed) R. L. TULLIS,
Notary Public.

Order Refusing Application to File Plea to the Jurisdiction and Motion to File Same.

Extracts from the Minutes.

November Term, 1897.

NEW ORLEANS, MONDAY, *December* 20, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

This day in open court J. J. McLoughlin, ass't city att'y, of counsel for defendant, presented a plea to the jurisdiction and a motion to file same.

Whereupon counsel for complainant and interveners objected to the filing of the same on the grounds urged by them. After hearing the counsel for both parties the court refused the application to file said plea at this time.

Hearing upon Master's Report and Exceptions Thereto: Exceptions Overruled and Report Confirmed, and Master's Fee Fixed.

Extract from the Minutes.

MONDAY, *December 20th*, 1897.

MRS. M. M. FISHER AT ALS.
vs.
CITY OF NEW ORLEANS. } No. 12516.

52 This case came on to be heard upon the report of E. D. Saunders, special master, filed May 22, 1897, and upon the exceptions filed thereto.

Charles Louque, appearing for the complainant, Mrs. M. M. Fisher, and for Jean Pomes, Mary Quinlan, F. J. Gasquet, J. Venta, Marie Fortier, Georgiana T. Young, Lizzie G. Wheelwright, Mary A. Sullivan and Francis Johnson, interveners.

E. Howard McCaleb appearing for Urban Koen and Mrs. Mary Gage, interveners.

Chas. J. Theard appearing for E. T. Duclaux, intervener.

J. J. McLoughlin, ass't city attorney, for The City of New Orleans, def't and exceptor.

Whereupon counsel for complainant and interveners offered in evidence the report and exhibits thereto annexed, and the cause was argued by the solicitors for the respective parties.

Whereupon and on consideration thereof it is ordered by the court that the exceptions to the master's report be overruled and the said report be confirmed.

It is further ordered that the master's fee be fixed at $250.00

Motion to Take from the Files "Exception to the Jurisdiction of the Court Ratione Materia et Personæ" and Plea in Abatement Granted.

Extract from the Minutes.

MONDAY, *December* 20, 1897.

MRS. M. M. FISHER ET ALS. *vs.* CITY OF NEW ORLEANS. } No. 12516.

The motion filed Dec. 13, 1897, by complainant herein to take from the files the two papers styled "exception to the jurisdiction of the court *ratione materiæ et personæ*" and plea in abatement, came on this day for hearing—present, Chas. Louque, solicitor for mover; J. J. McLoughlin, ass't city att'y, for def't—and was submitted; whereupon it was ordered that said motion be granted and that said documents be taken from the files.

Motion to Fix and Order.

Entered and filed Dec. 20, 1897.

53 Circuit Court of the United States for the Eastern District of La.

MRS. M. M. FISHER *vs.* CITY OF NEW ORLEANS. } No. 12516.

On motion of Chas. Louque, solicitor for complainant, and on suggestion to the court that this cause is now ready to be heard on its merits:

It is ordered by the court that this cause be fixed on final hearing on Tuesday, the 28th, 1897, and let the defendant be notified.

Hearing of Cause, Notes of Evidence, and Submission.

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, SATURDAY, *January* 22, 1898.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, district judge.

MRS. M. M. FISHER ET ALS. *vs.* CITY OF NEW ORLEANS. } No. 12516.

This case came on this day for final hearing upon the bill, answer, replication, exhibits, proofs and testimony and master's report; whereupon the counsel for the complainants offered the following evidence on her behalf, viz:

1. The petition, exception, answer and judgments in Mrs. M. M. Fisher *vs.* Board of School Directors, No. 12060, United States circuit court for this district.

2. The master's report and order of the court approving same.

3. The report of C. H. Stewart and Chas. A. Aitkens to the master.

4. The report of Clark Steen of the standing of the schools.

5. The testimony taken before the master, Mrs. Mary Pohlman, Henry Stewart, Malcolm Reach, Clark Steen and Chas. A. Aitkens.

6. The various judgments in favor of interveners and reports of master thereon as well as waiver of reference, as follows:

Mrs. M. M. Fisher, judgment for $11,094.87/100 with legal interest on $8,097.17/100 from May 22/97.

54 To the same, $8,802.39/100 with legal interest on $7,401.69/100 from May 22, 1897.

And the further sum of $5,864.64/100 with legal interest on $5,140.30/100 from May 22, 1897.

F. J. Gasquet, the sum of $57,059.69/100 with legal interest on $44,978.74/100 from May 22/97.

Joseph Venta, the sum of $21,297.77/100 with legal interest on $17,006.27/100 from May 22, 1897.

Mary Quinlan, the sum of $5,373.75 and fifteen dollars costs with 5 % interest from December 2, 1897.

Jean Pomes, the sum of $6,315.73/100 with fifty dollars costs and legal interest from M'ch 20, 1897.

Georgiana T. Young, $653.12/100 with ten dollars costs.

Miss Mary Fortier, the sum of $32.19/100 and five dollars costs.

D. A. Chaffraix, the sum of $4,627.94/100 and seven 59/100 dollars costs.

Wid. Amelie Gautreau, the sum of $100.00/100 dollars with legal interest from Aug. 29, 1897, and five dollars costs.

Mrs. A. B. Gage, the sum of $515.44/100 with 5 % interest from Nov. 30, 1887.

Ed. F. Ducloux, the sum of $2,090.17/100 and $81.00/100 costs.

U. Koehn, the sum of $22,991.07/100 and $27.10/100 costs.

Peter Johnson, the sum of $172.45/100 with legal interest from date of judgment being —— and costs amounting to $——.

H. Abraham & Son, the sum of $1,001.68/100 with legal interest from date of judgment being —— and costs amounting to $——.

And counsel for Mrs. Mary A. B. Gage, intervener, offered the following evidence on her behalf:

1. Master's reports herein.

2. Decree confirming master's reports.

3. Judgment of the civil district court for the parish of Orleans in the suit of Mrs. Mary A. B. Gage *vs.* The Board of Directors of the Public Schools *et al.*

And counsel for U. Koen, intervener, offered the following evidence on his behalf, viz:

1. Master's reports herein.

2. Decree confirming master's reports.

3. Judgment of the civil district court for the parish of Orleans,

division "D," in the suit entitled Urban Koen *vs.* Board of
55 Directors of the Public Schools of the Parish of Orleans, No. 53833 of the docket thereof.

4. Waiver and consent on intervener's petition herein.

And thereupon counsel for the defendant offered the following evidence in her behalf, viz:

1st. Copies of all the budgets of the city of New Orleans, showing estimated revenues and expenditures, for the years 1871 to 1879 inclusive.

2nd. All the record of the suit No. 12060 in this court that has not already been offered by the complainant, and particularly the *fi. fa.*, garnishment, interrogatories, and answers thereto of Charles H. Schenck, city treasurer, and *ex officio* treasurer of the school board.

Whereupon the case was argued by the solicitors for the respective parties and submitted—when the court took time to consider.

Complainant's Offerings.

Petition, exception, answer, and judgments in Mrs. M. M. Fisher *vs.* Board of School Directors, No. 12060, United States circuit court for this district.

Petition. Filed February 23, 1892.

To the hon. the circuit court of the United States for the eastern district of Louisiana:

The petition of Mrs. M. M. Fisher, born Blackadder, duly authorized and assisted by her husband, M. M. Fisher, who appears herein, for said purpose and joins his said wife herein, both citizens of the Kingdom of Spain, and residing in the island of Cuba, respectfully represents:

That your petitioners have recovered judgment against the Board of Directors of the City Schools of New Orleans, a corporation duly created under the laws of the State of Louisiana, and a citizen of said State, for the sum of eight thousand and ninety-seven 17/100 dollars, with legal interest from May 22d, 1890;

That said judgment was rendered in favor of your petitioner and against said defendant, by the civil district court for the parish of Orleans, under No. 30262 of the docket of said court;

That your petitioner's claim which formed the basis of the aforesaid judgment was for the salary due to petitioner for work actually
56 done as a school teacher of the public schools of the city of New Orleans and for the salary of other teachers whose claims were transferred to your petitioner, as the whole more fully appears by the certified copies of the petition, answer and judgments, both of the district court and affirmed by the supreme court of Louisiana, on appeal;

That said judgment is made payable out of the school tax levied

by the city of New Orleans, on the assessed property of said city, for the years 1878 and previous years;

That notwithstanding due demand the defendants refuse to pay. Wherefore, petitioners pray that E. B. Kruttschnitt, president of the board of directors of the city schools of New Orleans, be cited hereto and after due proceedings be condemned to pay your petitioners the sum of eight thousand and ninety-seven 17/100 dollars with 5 % interest per annum, from May 22nd, 1890, payable out of the school tax levied by the city of New Orleans prior to 1879; and petitioners pray for general relief, &c.

(Signed) CHAS. LOUQUE, *Attorney.*

(Indorsed:) No. 12060. Circuit court of the U. S. for the eastern district of La. Mrs. M. M. Fisher and Husband *vs.* The Board of Directors of the City Schools of New Orleans. Pet'n and record. Chs. Louque, att'y.

Exception.

Filed March 5, 1892.

United States Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER, Authorized and Assisted by Her Husband, M. M. Fisher,
vs.
BOARD OF DIRECTORS OF THE CITY SCHOOLS OF NEW Orleans. } No. 12060.

Now comes into court the defendant in the above entitled and numbered case, and, for exception to the plaintiff's petition, pleads:

First. That the said plaintiff is without capacity to stand in judgment in this case, for this, that whatever interest the said plaintiff may have had therein, has been seized, and is now in the possession of and the property of the defendants in the case of Mrs. M. M. Fisher, duly authorized by her husband, *versus* The Board of School Directors, No. 30262 of the civil district court of the parish
57 of Orleans, and defendant hereby makes profert of the writ of *fieri facias* in said suit, No. 30262, and the return thereon of the sheriff, and pleads the same, and makes the same part of this exception.

Second. That the court is without jurisdiction to hear and determine this case, for this, to wit: that the rights and credits, the school warrants herein proceeded on, are held by the plaintiffs herein, under assignments, and that the assignors are all citizens of the State of Louisiana and residents of the city of New Orleans, and, therefore, without right to sue defendant in this court, defendant being likewise a citizen of the State of Louisiana and likewise a resident of the city of New Orleans, and that it is not competent for Mrs. M. M. Fisher, the plaintiff herein, in her said character of assignee, to sue defendant.

That Miss M. A. McClane is the owner of school certificates,

transferred and assigned by her to defendant, by means of fourteen different transfers, and that Miss M. A. McClane is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That Miss I. Simmons is the owner of school certificates transferred and assigned by her to plaintiff, by means of eleven different transfers, and that Miss I. Simmons is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That Miss A. A. Finch is the owner of school certificates transferred and assigned by her to plaintiff, by means of three different transfers, and that Miss A. A. Finch is a citizen of the State of Louisiana, and a resident of the city of New Orleans.

That Miss Petard is the owner of school certificates, transferred and assigned by her to plaintiff, by means of three different transfers, and that Miss Petard is a citizen of the State of Louisiana, and a resident of the city of New Orleans.

That Miss M. A. Swatson is the owner of school certificates, transferred and assigned by her to plaintiff by means of ten different transfers, and that Miss M. A. Swatson is a citizen of the State of Louisiana, and a resident of the city of New Orleans.

That Misses I. E. O'Brien, Sheehan, Miller, M. A. Hart, Sintes and Ducatel are owners of school certificates, transferred and assigned by them to plaintiff, by means of different transfers, and that they are all citizens of the State of Louisiana, and residents of the city of New Orleans.

That Miss S. B. Horton is the owner of school certificates, transferred and assigned by her to plaintiff, by means of seven different transfers, and that Miss S. B. Horton is a citizen of the State of Louisiana, and a resident of the city of New Orleans.

That Miss C. A. Warber is the owner of school certificates, transferred and assigned by her to plaintiff by means of three different transfers, and that Miss C. A. Warner is a citizen of the State of Louisiana, and a resident of the city of New Orleans.

58 That Miss M. M. Lowe is the owner of school certificates, transferred and assigned by her to plaintiff by means of fifteen different transfers, and that Miss M. M. Lowe is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That said claims so transferred form the basis of the judgment herein sued on, and that it is so admitted by plaintiff's petition, and that it also appears by said petition that defendant is a citizen of the State of Louisiana.

Wherefore exceptor prays that said exceptions be maintained, and plaintiff's suit herein dismissed with costs.

(Signed) CARLETON HUNT, *Attorney.*

Judgment on Exception to Jurisdiction.

Extract from Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, November Term, 1891.

NEW ORLEANS, SATURDAY, *March* 26, 1892.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

MRS. M. M. FISHER and HUSBAND
vs.
THE BOARD OF DIRECTORS OF THE PUBLIC SCHOOLS of the City of New Orleans. } No. 12060.

By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged and decreed that the exception to the jurisdiction of the court herein filed by defendants be overruled.

Judgment rendered March 26, 1892.
Judgment signed March 31, 1892.
(Signed) EDWARD C. BILLINGS, *Judge.*

Order Overruling Exception as to Seizure of Plaintiff's Interest, etc.

Extract from the Minutes, November Term, 1891.

59 NEW ORLEANS, SATURDAY, *April* 16, 1892.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

MRS. M. M. FISHER ET AL.
vs.
BOARD OF DIRECTORS OF PUBLIC SCHOOLS OF NEW Orleans. } No. 12060.

This cause came on to be heard upon the exception herein filed by the defendant to the effect that plaintiff's interest has been seized by defendants in the suit No. 30262 of the civil district court, parish of Orleans, entitled Mrs. M. M. Fisher *versus* The Board of School Directors and that plaintiff is without capacity to stand in judgment—present, Charles Louque, attorney for plaintiffs; present, Carleton Hunt, for defendants—whereupon, plaintiffs offering in evidence the receipt of the sheriff of the parish of Orleans for the amount of costs due in said suit No. 30262 of the civil district court, thereby releasing said seizure, it was ordered that the exception be overruled.

Answer.

Filed May 10, 1892.

U. S. Circuit Court, East. Dist. of La.

MRS. M. M. FISHER, Authorized, etc., *vs.* BOARD OF SCHOOL DIRECTORS. } No. —.

Into this honorable court comes the Board of Directors of the City Schools of New Orleans, and for answer to the demand against them made in part to your honor, and without in any way waiving the exceptions herein already passed upon, denies each and every allegation in the said petition contained, and prays for strict proof thereof, and that the same be dismissed at plaintiff's cost, and for all general relief.

(Signed) E. A. O'SULLIVAN,
City Attorney.

60 *Judgment.*

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, April Term, 1892.

NEW ORLEANS, THURSDAY, *May* 19, 1892.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

MRS. M. M. FISHER and HUSBAND *vs.* THE BOARD OF DIRECTORS OF THE CITY SCHOOLS OF New Orleans. } No. 12060.

By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged and decreed that the plaintiff, Mrs. M. M. Fisher, and her husband, M. M. Fisher, have judgment in her favor and against the Board of Directors of the City Schools of New Orleans, for the sum of eight thousand and ninety-seven $\frac{17}{100}$ dollars with 5% interest per annum from May 22, 1890, and costs, payable out of the school tax levied by the city of New Orleans prior to 1879.

Judgment rendered May 19, 1892.

Judgment signed May 24, 1892.

(Signed) EDWARD C. BILLINGS, *Judge.*

Master's Report and Order of the Court Approving Same.

Report copied at pages 32 *et seq.*, and order approving report copied at page 65 of this transcript.

Reports of Chas. A. Aitkens to the master, referred to in complainant's note of evidence, copied at page 35 *et seq.* and also at page 38 *et seq.* of this transcript.

Filed January 22, 1898.

Expenditures of Schools, 1873.

Receipts.

Receipts from State treasurer.....	$153,142.34	
Receipts from city of N. O. from March 25, 1873, to March 2, 1876.	309,872.12	
Rec'd from school board, Carrollton	369.86	

Expenditures.

Teachers' salary.....	$3,577,577.69	
Rents	35,536.25	
Porters & portresses.	24,032.00	
School-house repairs and supplies.....	31,077.16	
Sec'y and employees of board.....	4,511.73	
Books, stationery and printing.....	4,698.07	
Law charges and expenses.....	2,926.35	
Transferred to— Carrollton tax.....	369.86	
Schools 1 & 74 by resolution of school board, June 7, '76.	2,655.21	
	463,384.32	463,384.32

Tax Levied by City of N. O., } of 10 00 for School Purposes for 1873.

On an assessment of 135,891,300.	$339,728.25	
Collected March 25, '73, to March 2d, '76.	309,872.12	
Tax yet to — collected.....	29,856.13	
Cancellations	6,058.00	
Balance.	$23,798.13	

Summary.

1874.	Unliquidated.....	$64,980.45	
	State portion as per judgment, 5th D. court, No. 10,762.	8,382.47	56,597.98
1875.	Unliquidated.....	126,387.31	
	State portion as per above.....	32,724.21	93,663.10
1876.	Unliquidated.....	102,493.78	
	State portion.....	41,407.48	61,086.30
1877.	Unliquidated.....	2,300.36	
	See above judgm't.		
1878.	Unliquidated.....	14,890.56	
	Unprovided, except by tax...		211,347.38

JOHN FISHER, TUTOR, ETC., ET AL.

53

62 *Statement of Collection of Taxes,* 1873 *to* 1878, *for School Purposes, and of the Amount of Cash Received, and also School Certificates Received from March* 25, 1873, *to March* 2, 1876.

Year.	Tax collected.	Cash received.	Certificates received.	Total cash & certificates.
1873	$309,872.12	$309,872.12		$309,872.12
1874	302,741.91	284,281.57	$31,141.89	315,423.46
1875	276,106.57	250,7[illegible].95	30,382.88	281,169.83
1876	266,967.26	255,432.52	7,109.43	262,541.95
1877	198,261.13	191,159.46	931.68	192,091.14
1878	200,182.82	185,500.04	426.11	185,926.15
Total tax	$1,554,131.81	$1,477,032.66	$69,991.99	1,547,024.65
Tot'l cash & certificates	1,547,024.65			
Am't on hand Nov. 1, '95	7,107.16			

School Expenditures, 1874.

Rolls.	Rents.	Portresses.	Teachers.	Totals.
January	$2,989.70	$1,996.30	$31,249.41	$36,235.41
February	2,889.70	1,995.00	31,603.30	36,488.00
March	2,819.70	2,025.00	31,848.00	36,692.70
April	2,989.70	2,015.55	31,706.34	36,711.59
May	2,866.05	2,015.00	31,603.45	36,484.50
June	2,844.70	2,040.00	32,322.57	37,207.27
July	2,486.35	2,050.00	32,264.55	36,800.90
August	2,486.35	2,050.00	32,264.55	36,800.90
September	2,594.70	2,010.00	32,067.60	36,672.30
October	2,594.70	2,040.00	32,601.36	37,236.06
November	2,594.70	2,046.25	32,537.55	37,178.50
December	2,584.70	2,041.00	32,536.69	37,162.39
Total	$32,741.05	$24,324.10	$384,605.37	$441,670.52

Carrollton teachers paid		$1,377.48
Salary sec'y, &c., Jan'y, '74, to Feb'y, '75		5,318.90
Books furnished		2,989.59
Stoves, grates, &c., paid at par	$1,519.05	
Bought for $132.00	440.00	
		1,959.05
Contingent expenses paid, face value	5,910.30	
Bought for $73.94	246.75	
		6,157.05
Printing and ads. paid, face value	1,487.08	
Bought for $9.28	32.00	
		1,519.08
Repairing buildings		9,963.80
N. O. Sanitary & Fert. Co., paid for face value Jan'y to Sept.	4,125.72	
Bought Oct. for $132.77	457.83	
		4,583.55
Fuel		1,575.00
Total bro't forward		441,670.52
Total expenditures		$477,114.02

	Estimate of the expenses for public schools for year 1874 as forwarded by board to city council (Nov. 25, '73).	Expenditures by board as per books of treasurer & rolls.
t of school building	$37,000.00	$32,741.05
		1,377.48
ries of teachers	350,000.00	384,605.37
ries of portresses	24,000.00	24,324.10
ries of secretary, &c	4,600.00	5,318.90
ool books	2,500.00	2,989.59
		1,959.05
l, stoves, grates, &c	5,000.00	1,575.00
oms	3,000.00	
ool furniture	10,000.00	
nks, printing, and adds	4,000.00	1,519.08
tingent	6,000.00	6,157.05
airs	10,000.00	9,963.80
itary		4,583.55
	$456,100.00	$477,114.02

Estimate of Receipts by Board.

te of Louisiana	$75,000.00
y of New Orleans	381,100.00
	$456,100.00

Possible Receipts.

m State as per estimate	$75,000.00
m city of New Orleans as per tax levied, being ¼ of 1 % on an assessment of $130,954,456.00	327,386.14
	$402,386.14

ash balance in La. nat'l bank to the credit of schools, 1874, $61.14.
n addition to the sum of $401,700.75, liquidated by cash payments and certifi-
s received for taxes of face value, there has been liquidated a further sum of
201.84 due to the purchase by the treasurer through instructions of board of
tificate, amounting to $10,371.68, for $3,170.84 in cash.

Actual Receipts.

m State		$77,794.33
y of New Orleans, tax 1874:		
Cash	$284,281.57	
Certificate	31,141.89	
		315,423.46
m State, Carrollton tax		369.86
m city of ——, Carrollton tax		1,497.02
nsferred from other years		6,677.22
		$401,761.89

Condition of City Tax.

y tax levied	$327,386.14
y tax collected	302,741.91
	$24,644.23
ncellations, &c	6,840.43
	$17,803.80

The foregoing examination of accounts of schools, 1874, show- that the board of directors presented to the council of the city of New Orleans an estimate of expenditures for year 1874, amounting to $456,100.90, whilst the actual expenditures, or liabilities, of said year *was* $477,114.02, or an excess of $21,014.02. The tax levied by the city of New Orleans, ¼ of 1 %, if total was collected, would amount to but $327,386.14, thus being a deficit from this source, over estimate by board, $381,100.00, of $53,713.86.

School Expenditures for 1875.

Pay-rolls.	Rents.	Portresses.	Teachers.	Totals.
January	$2,564.70	$2,050.00	$32,515.80	$37,130.50
February	2,604.70	2,060.00	32,490.60	37,155.30
March	2,579.70	2,085.00	32,511.10	37,175.80
April	2,579.70	2,170.00	32,513.25	37,262.95
May	2,504.70	2,085.00	32,554.30	37,144.00
June	2,504.70	2,079.90	32,679 85	37,264.45
July	2,489.70	2,080.00	26,070.70	30,640.40
August	2,409.70	2,095.00	26,070.70	30,575.40
September	2,412.20	2,491.80	32,743.15	37,647.15
October	2,424.70	2,453.80	33,283.20	38,161.70
November	2,486.70	2,480.80	33,498.70	38,466.20
December	2,523.35	2,465.80	53,545.50	38,534.65
	$30,084.55	$26,597.10	$380,476.85	$437,158.50

Estimate of Receipts.

State of Louisiana	$48,825.71
City of N. O., ¼ of 1 %, tax on ass't of $119,288,504	298,221.26
	$347,046.97

Actual Receipts.

From State of La.		48,825.71
From city of New Orleans:		
Cash	$250,786.95	
Certificates	30,382.88	
Total	$281,169.83	281,169.83
		$329,995.54

65 *Add.*

Repairs to leased bldgs. p'd face value	$3,110.00	
Purchased for $27.50	54.00	
		3,164.00
Stoves, grates, and fuel	5,596.64	5,596.64
Salaries of secretaries, M'ch, 1875, to Feb'y, '76	4,600.20	4,600.20
Books free		33.76
Cleaning and sanitary ex., face value	3,661.92	
Purchased for $129.47	235.40	
		3,897.32
Contingent		2,738.13
Printing, p'd face value	104.60	
Purchased for $9.42	18.50	
		123.10
School furniture		3,618.05
Total expenditures		$460,929.70

	Estimate of expenditures by board.	Estimate of expenditures as per rolls — books of treasurer.
Rent	$31,636.00	$30,084.55
Teachers	383,860.00	380,476.85
Porters, &c.	24,400.00	26,597.10
Repairs	5,000.00	3,164.00
Stoves, grates, fuel	5,000.00	5,596.64
Secretary	4,600.00	4,600.20
Free books	5,000.00	33.76
Sanitary	8,000.00	3,897.32
Contingent	6,000.00	2,738.13
School furniture	5,000.00	3,618.05
Music teacher	6,500.00	
Printing	1,504.00	123.10
	$486,500.00	$460,929.70
Cash b'ce to credit of schools, 1875		$72.57

In addition to the sum of 32992297 liquidated by cash payments and certificates received for taxes, face value, there has been liquidated a further sum of 354685, due to the purchase of certificates, amounting to $7,198.27, for $3,651.42 cash.

Condition of Tax.

City t'x levied	$298,221.26
Collected	276,106.57
Outstanding	22,114.69
Cancellations	8,235.24
Still due	$13,879.45

66 *School Expenditures, 1876.*

Rolls.	Rents.	Portresses.	Teachers.	Totals.
January	$2,339.70	$2,469.80	$33,349.00	$38,158.50
February	2,363.70	2,450.80	32,796.50	37,611.00
March	2,339.70	2,476.80	32,727.85	37,544.35
April	2,288.70	2,509.80	32,716.00	37,514.50
May	2,338.70	2,499.80	32,869.85	37,708.35
June	2,314.70	2,449.80	32,869.90	37,684.40
July	2,394.70			2,394.70
August	2,344.70			2,344.70
September	2,199.70	2,449.80	32,679.90	37,328.40
October	2,199.70	2,449.80	32,900.80	37,550.30
November	2,199.70	2,451.80	32,874.95	37,526.45
December	2,299.70	2,451.80	33,497.40	38,248.90
Total	$27,623.40	$24,710.00	$329,282.15	$381,615.55

Repairs	$6,996.57
Stoves and fuel	1,397.90
Sec't'y's salary, March to Dec	3,833.50
Sanitary	4,237.47
Contingent	3,286.48
Furniture	3,101.42
Total br't forward	381,615.55
Total expenditures	$404,478.89

	Estimate of expenditures by board.	Expenditures as per rolls & books of treasurer.
Teachers and portresses	$352,570.00	$353,992.15
Rents	25,000.00	27,023.40
Repairs	8,000.00	6,996.57
Stoves and fuel	5,000.00	1,397.90
Secretaries	4,600.00	3,833.50
Sanitary expenses	5,650.00	4,237.47
Contingent	5,000.00	3,286.48
School furniture	3,000.00	3,101.42
	$408,820.00	$404,478.89

67 *Estimate Receipts.*

State of Louisiana, actual	$43,784.27
City of New Orleans, tax ½ of 1% on an assessment of $119,045,515.00.	297,613.78
	$341,398.05

Actual Receipts.

State of Louisiana		$43,784.27
City of New Orleans—		
Cash	$255,432.52	
Certificates	7,109.43	
		262,541.95
		$306,326.22
Tax levied		$297,613.78
Tax collected		266,967.30
		$30,646.52
Cancellations		11,712.04
		$18,934.48

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Rolls.	Treasurer's department.	Secretary's office.	Supt.'s office.	Repairs.	Printing & advertising.	Supplies.	Sanitary.	Attorney's fees.	Fuel.	Rents.	Pensions.	Teachers.	Totals.
January										$2,169.70	$2,456.60	$33,705.90	$38,332.20
February						$16.00				2,369.70	2,456.80	33,722.15	38,564.65
March				$142.10	$2.40	201.50				2,269.70	2,456.80	33,843.20	38,934.30
April		$225.25	$80.40	9.75	9.60	54.45				1,301.80	1,462.08	20,176.76	23,339.09
May	$100.00	219.37	101.50	141.75	50.45	127.58				1,437.80	1,462.05	20,187.45	23,827.95
June	Contingent. 29.00	228.15	100.00	31.50	352.50	80.20				1,369.80	1,462.05	20,193.45	23,855.95
July	462.00	207.25	100.00	145.05	25.00					1,354.80	735.70		2,833.60
August	150.00	100.00	100.00	253.50	9.90	22.00				1,354.80	713.40		2,803.60
September	360.50	180.00	99.98	460.41	140.44	207.35				1,348.80	729.00		3,526.43
October	149.25	180.00	98.30	355.00	117.06	989.25	$25.00		$1,013.00	1,358.80	1,420.80	6,454.25	12,145.71
November	51.50	195.00	99.70	67.55	236.10	150.65	70.00	$500.00	454.00	1,445.80	1,449.80	19,077.75	23,798.85
December	12.83	210.00	101.00		117.50	21.65	70.00	250.00		1,711.30	1,455.80	19,472.00	23,422.68
Total	$1,315.08	$1,856.32	$809.88	$1,605.61	$1,091.60	$1,879.72	$165.00	$750.00	$1,467.00	$19,402.80	$18,261.48	$280,833.51	$255,621.00

69 *Add.*

Secretary's salary, Jan., Feb., M'ch, not on rolls	$1,
Sanitary ac. not on rolls	1,
Contingent ac. not on rolls	1,
Furniture ac. not on rolls	
Repairs ac. not on rolls	1,
Stoves, fuel acc't, not on rolls	2,
Treasurer's office ac. not on rolls	
	$9,
Total br't forward	255,
Total expenditures	$264,

Receipts.

From State treasurer	$70,
From city of New Orleans	191,
	$261,
Certificates rec'd for tax of 1877	
Total receipts	$262,

	Estimate of expenditures by board.	Expendi as per & boo treasu
		$18,
Teachers and portr	$354,500.00	206,
Rents	27,500.00	19,
Repairs	7,000.00	2,
Stoves and fuel	3,000.00	3,
Secretaries	4,600.00	3,
Sanitaries exp.	4,000.00	1,
Contingent	5,000.00	1,
Furniture	3,000.00	
Treasurer's dep't		2,
Sup.t's office		
Printing		1,
Supplies		1,
Attorney's fees		
	$408,600.00	$264,

Estimated Receipts.

State of Louisiana, actual	$70,
City of New Orleans, tax ½ of 1% on an assessment of $109,669,889.00.	*219,
	$289,

70 *Actual Receipts.*

State of Louisiana		$70,
Cash	191,159.46	
Certificate	931.68	
		192,
		262,
City tax levied		*$219,
Collected		198,
		$21,
Cancellations		5,
		$15,
Cash balance November 1st, 1895		

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School Expenditure, 1878.

Rolls.	Attorney's fees.	Contingent.	Supplies.	Printing & advertising.	Fuel.	Sanitary.	Secretary's office.	Sup't's office.	Furniture.	Repairs.	Teams.	Postmaster.	Teachers.	Totals.
January	$83.35	$51.50	$342.74	$235.35	$819.—	$70.00	$235.00	$100.00	$66.70	$2,216.66	$1,386.80	$1,363.00	$10,430.60	$36,430.70
February	83.35	15.00	181.06	27.95	614.55	70.00	250.00	100.00	32.40	1,429.67	1,411.80	1,358.00	10,489.45	25,413.23
March	83.30	11.25	675.39	72.35	30.60	70.00	240.00	100.00	113.50	2,256.63	1,501.80	1,358.00	10,473.00	25,805.12
April		78.85	319.55	137.20		70.00	245.00	100.00	189.35	259.65	1,322.80	1,345.00	19,586.15	23,657.65
May				13.35		70.00	241.40	100.50	508.45	290.10	1,322.80	1,345.00	19,588.40	23,478.60
June		20.00	90.45	177.35		70.00	241.85	100.00	39.30	41.98	1,322.80	1,345.00	19,569.70	23,018.43
July		2.50	37.29	42.00		70.00	240.00	100.00	15.00	949.60	1,322.80	1,345.00	19,561.60	23,335.79
Do.														340.00
August		250.00	160.00	214.80		70.00	240.00	100.00	46.00	6,116.70		679.85	9,780.50	17,287.14
Do.			29.20	41.35		70.00	240.00	100.00	167.50	167.50	1,322.80	679.80	9,784.00	13,225.77
September		250.00	254.82	260.40	635.50		240.00	100.00	1,752.92	626.80	1,323.15	1,315.00	19,219.00	24,880.18
October			218.91			70.00	245.00	100.00			1,300.15	1,335.00	19,219.00	22,350.15
November						70.00	240.00	95.70			1,320.15	1,335.00	20,372.45	23,441.30
			316.66											316.66
														330.
December			185.00			70.00	240.00	70.00			1,305.15	1,363.00	19,802.75	23,115.90
Total	$750.00	$1,205.76	$2,429.32	$1,122.39	$2,119.65	$840.00	$2,898.25	$1,166.20	$2,181.62	$14,394.69	$16,263.00	$16,164.65	$234,870.00	$296,415.53

$1,150.05
1,804.40
1,340.55
715.75
1,040.50
2,233.75
800.00

$9,085.00
255,621.00

$264,706.00

$70,314.50
191,154.07

$261,468.57
931.68

$262,400.25

penditures,
per rolls
books of
easurer.

$18,261.48
206,833.51
19,492.80
2,646.11
3,700.75
3,006.37
1,969.40
1,340.55
715.75
2,115.08
899.88
1,094.60
1,879.72
750.00

$264,706.00

$70,314.50
219,339.78

$289,654.28

$70,314.50

192,091.14

262,405.64

$219,339.78
198,261.13

$21,078.65
5,636.78

$15,441.87
$57.48

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Add.

Attorney's fees, not on rolls	$250.00
Secretary's office, not on rolls	66.56
Treasurer's office, not on rolls	1,200.00
Total br't for'd	$1,516.66
	296,415.53
Total expenditures	$297,932.19

Receipts.

From State treasurer	$97,115.48
From city of N. O.	185,493.73
	$282,609.21
Certificates rec'd for tax of 1878	426.11
Total receipts	$283,035.32

	Estimate of expenditures.	Expenditures, rolls & books, treasurer.
Teachers' salaries	$231,288.00	$234,870.00
Portresses	17,544.00	16,164.65
Rents	17,256.00	16,263.00
Supt.'s office	1,200.00	1,166.20
Treasurer's office	1,200.00	1,200.00
Secretary's office	3,000.00	2,964.91
Supplies, brooms, &c	2,200.00	2,439.32
Stationery, printing, &c	2,500.00	1,122.39
Fuel	3,150.00	2,119.65
Sanitary ex'g	850.00	840.00
Stoves and repairs	1,500.00	Cont'g't. 1,295.76
Furniture repairs	12,000.00	Atty's fees. 1,000.00
		2,181.62
Repairs to schools	10,000.00	14,304.69

Schools, 1878.

State of Louisiana, "actual,"		$97,115.48
City of N. O. ½ of 1% on an ass't of $111,147,245.00		222,294.49
		$319,409.97
Actual receipts, State of La.		97,115.48
Actual receipts, city of N. O.—		
Cash	$185,500.04	
Certificates	426.11	
		185,926.15
		$283,041.63
Tax levied		$222,294.49
Collected		200,182.82
		$22,111.67
Cancellations		6,339.81
Outstanding		$15,771.86
Cash balance		$47.32

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NEW ORLEANS, *November 1st*, 1895.

Statement of the Total Expenditures for Public Schools for the Years 1873 *to* 1878, *Inclusive, and of the Amounts Liquidated, Amounts Due, and of Taxes Outstanding to Liquidate.*

		Liability.	Taxes uncollected.	Deficit.
Schools, 1873:				
Total expenditures	$463,384.62			
Total receipts	463,384.32			
			[*]23.798.13	
Schools, 1874:				
Total expenditures	477,114.02			
Amounts liquidated	412,072.43			
	65,041.59			
Less cash balance	61.14			
		64,980.45	17,803.80	47,176.65
Schools, 1875:				
Total expenditures	460,929.70			
Amounts liquidated	333,469.82			
	126,459.88			
Less cash balance	72.57			
		126,387.31	13,879.45	112,507.86
Schools, 1876:				
Total expenditures	408,820.00			
Amounts liquidated	306,251.95			
	102,568.05			
Less cash balance	74.27			
		102,493.76	18,934.48	835,559.30
Schools, 1877:				
Total expenditures	264,706.00			
Amount liquidated	262,348.16			
	2,357.84			
Less cash balance	57.48			
		2,300.36	15,441.87	[*]13,141.51
Schools, 1878:				
Total expenditures	297,932.19			
Amount liquidated	282,994.31			
	14,937.88			
Less cash balance	47.32			
		14,890.56	15,771.86	[*]881.30
		311,052.46		
Total reduction of taxes from 1873 to 1878			105,629.59	
By cancellations, judgments, &c.				$243,243.81
$44,822.30 less excess [* excess in red ink]				37,820.94
Total deficit				205,422.87

74 STATE *ex Rel.* METTAXA *vs.* ALLEN JUMEL, Aud'r. } No. 10762. Fifth D.

In this cause submitted to the court, considering the law and the evidence to be in favor of relators and for the reasons this day orally assigned in open court;

It is ordered, adjudged and decreed that there be judgment in favor of the relators Miss J. Mettaxa and Miss Augusta A. Finch

and against the defendant Allen Jumel, auditor of the State Louisiana, making peremptory the writ of mandamus hereinbef issued, so far as to command the said Allen Jumel, auditor, to is and deliver to relators, warrants for the school certificates descril in the Schedule "A" annexed to relator's petition for the follow amounts:

For (12 9/10 %) twelve and 9/10 per cent. of the amount of certificate for the year 1874;

For (25 9/10) twenty-five 9/10 per cent. of the amount of cert cates for 1875;

For 4/10 per cent. (40 4/10) of the amounts of the certificate the year 1876 and for the full amounts of the certificates for years 1877—1878 and 1879;

It is further ordered that the defendant pay costs.

Testimony of Mrs. Mary Pohlman, Henry Stewart, Malcolm Re Clark Steen, and W. H. Michel, for Complainant.

Filed Jan. 22, 1898.

United States Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

Testimony taken in the above numbered and entitled cause on half of complainants, on the 6th day of April, 1897, in the arch room of the city hall, before E. D. Saunders, special master pointed under order of court.

Appearances.

E. D. Saunders, special master.

75 Louque & Pomes, counsel for complainants.
James J. McLoughlin, counsel for defendant.

Index.

* * * * * * *

MRS. MARY POHLMAN, sworn and examined on behalf of c plainants, testified as follows:

Direct examination by Mr. LOUQUE:

Q. What is your name?
A. Mrs. Mary Pohlman.
Q. Where do you reside?
A. 1612 Saint Charles avenue.
Q. What position do you occupy in the city hall?
A. Custodian of the city archives.
Q. Will you please state whether the records which you h under your charge, and more especially the treasurer's and co

troller's reports, are the original books of these offices under your charge?

A. Yes, sir.

Q. During the last two weeks, do you remember to have seen Mr. Henry Stewart, this gentleman sitting there, and Mr. Malcolm Reach, this gentleman sitting there, examining these books?

A. Yes, sir.

Q. In this office?

A. Yes, sir.

Cross-examination by Mr. McLOUGHLIN:

Q. Do these books contain all the reports up to date, or only up to the year 1891?

A. Up to 1891?

Q. So that the books from 1891 are not up here, 1891 to 1896?

A. No, sir.

Q. You have not those books?

A. No, sir.

Counsel for complainants offers in evidence the ten books of the comptroller's office, from 1872 to 1891 inclusive, books marked from 5 to 14, of the comptroller's cash books, and treasurer book from 1890 to 1891.

HENRY STEWART, witness sworn and examined on behalf of complainant, testified as follows:

76 Direct examination by Mr. LOUQUE:

Q. You have examined the comptroller's books for what purpose?

A. For the school proportion of the tax of 1871 and 1873 and from March, 1876.

Q. Have you made any memorandums?

A. I have, in detail.

Q. Are those two books in Mr. McLoughlin's hands the memorandums which you made of the collection of the '71 and '73 tax made by the city hall from what time to what time?

A. From March 23rd, 1876, to December 31st, 1891, as per Exhibit "A."

Q. Could you take this memorandum of yours and trace up in that comptroller's book every entry which you have taken out of these books?

A. I can.

Q. Do you swear that the memorandum which is now in Mr. McLoughlin's hand, made by you, is a correct transcript of these books?

A. Yes, sir.

Counsel for complainants offers in evidence the two books marked 1 & 2, in connection with the testimony of Henry Stewart.

Cross-examination by Mr. McLOUGHLIN:

Q. Your examination ends at the book of '91?

A. Yes, sir.

Q. If any taxes of these back taxes that are included in this a still uncollected—if they have been collected since '91 would t credits have been made on these books or books now down in t comptroller's office?

A. I have nothing to do with what happened since '91.

Q. You can't say, then, from your testimony, whether or not the taxes marked here as collected, have been turned over to the sch board or for school purposes, since '91?

A. No, sir.

By Mr. LOUQUE:

Q. Mr. Stewart, look at these books and see from those books t work that you have done in the examination of these other boo so far as the city is concerned?

A. I examined 1874.

Q. You look at the whole of them and see the work that you ha done?

A. 1874, I retranscribed and rechecked, this was done by M Reach and myself.

77 Q. What Mr. Reach?

A. E. S. Reach.

Q. You rechecked it over?

A. Yes, sir.

Q. Can you testify as to the correctness of that memorandum?

A. Yes, sir, 1874.

Q. Now see about the others?

A. 1875, the same.

Q. You swear to that being the same?

A. Yes, sir. 1876, the same, in conjunction with Malcom Reac because part is his handwriting and part of mine.

Q. You swear to the part that you made?

A. Yes, sir. There is only one portion of '77 mine.

Q. From what date to what date is that portion?

A. From May, 1879, to March 9th, 1880, and then from May 2n 1877, to December 29th, 1877. 1878 is mine. From Novemb 14th, 1878, to December 31st, 1879, for the year 1878, is mine. Th item shows $1,465——

Q. Explain those entries in that book and what is the folio a what is the title of the book.

A. The title of it is " for interest from 24th day of January, d ferent interest collected on the years '73 to '78 inclusive amountin to $1,465.42 running from January 12th, '81, to January 24t 1881.

Q. Those years have been clubbed together?

A. Yes, sir, taken from the Treasurer's Book No. 11.

Q. Have you got any other?

A. No, sir.

Counsel for complainant offers in evidence these various books, 8 books, marked from 3 to 10 inclusive, in connection with the witness' testimony.

Q. Explain that rebate book, tell us what the rebate book shows.
A. The rebate book shows the prepayment of taxes from the 1st day of June of each year. 1873——
Q How much have you got for 1873?
A. I have got—there is 1873——
Q. In each item as you have got it?
A. $82.96—1873, $2,026.49: 1876, $347.48: 1875, $18,450.03: 1876, $5,343.11: 1878, $28,544.74. These rebates were partially taken by me, especially 1876 and part of 1875.

By Mr. SAUNDERS:

Q. You have taken the *pro rata?*
A. No, sir.

By Mr. MCLAUGHLIN:

Q. You have never figured the *pro rata* on the rebates?
A. No, sir.

78 By Mr. LOUQUE:

Q. Have you made a condensed statement of these various books?
A. All with the exception of the rebates.
Q. Please look at those two documents——
A. That is Exhibit "A" which refers entirely to the tax of '71 to '73, due the schools, and showing its *pro rata* of each and every year. 1871 aggregates $7,731.65 and 1873's proportion is $8,200.76—marked 11. Exhibit "B" will be marked 12, and represents the *pro rata* of interest due the schools, of 1871 to 1878. For the year 1871 it amounts to $11,835.87: 1873, $13,838.29: 1874, $10,758.48: 1875, $6,041.24: etc.

Mr. MCLOUGHLIN to Mr. Louque: I notice that you have figured on here—you have charged the city with 5 % interest on all these collections—I want to know why you charge the city with 5 % interest?

By Mr. LOUQUE: In the answer of the City of New Orleans it is claimed that this interest belongs to the city and inasmuch as the city does not admit that she was collecting this fund as an agent but retains it and claims an adverse interest to the *cestui que trust*, we claim that the City of New Orleans owes interest to us at the rate of 5 %, which is legal interest, from the time she took this money and kept it in her possession as adverse interest. That is the reason why this calculation is made, but a little later on you will see that I will not charge the city. I have got enough money without charging that at all.

Counsel for the city reserves the right of examining the books of which these extracts purport to be accurate statements and of supplementing or correcting same as the examination will show.

Counsel for the city states this is statement, exhibit marked 12, purporting to be the amounts due by the city for school poses. for collection for various uses, they have added intere the same at 5 % per annum from the date of the collection this date 1897. Counsel for the city objects to any such thi that, it is a question of law and not of fact as to whether tha terest is chargeable to the city or not.

MALCOLM REACH, witness sworn and examined on behalf of plainants, testified as follows:

Direct examination by Mr. LOUQUE:

Q. You have examined those books with Mr. Stewart?
A. Yes, sir.
79 Q. Can you swear to the correctness of the memoran you took?
A. That memorandum that I took, yes sir.

Counsel for complainant offers in evidence memorandums t by witness, in connection with witness's testimony.

Q. You heard the testimony of Mr. Stewart?
A. Yes, sir.
Q. You have been working here with him for the last two w
A. Yes, sir.
Q. All that time you were making the transcript out in the here?
A. The transcripts were made mostly at night. We took amounts from the books in the daytime and transcribed the night mostly.

By Mr. MCLOUGHLIN:

Q. You never checked up or went downstairs to compare current books?
A. No sir, these amounts were taken from the comptroller's books.
Q. Those that are here in this office?
A. Yes, sir.
Q. So that any changes that may have occurred since, by bursements of this money, since '91, wouldn't that affect your ment one way or the other—for example, suppose this $5 shown to be due by your statement—if the comptroller had year or year before last, paid that $50,000 over to the school it wouldn't show on your statement?
A. No, sir.

Counsel for defendant makes the same reservation to all mony of this kind as was made to the testimony of Mr. Stewa

CLARK STEEN, witness sworn and examined on behalf of complainants, testified as follows:

Direct examination by Mr. LOUQUE:

Q. What is your present position?
A. I am with the dock commission.
Q. What position did you occupy previous to that?
A. Previous to that I was secretary to the mayor of New Orleans.
Q. Mayor Fitzpatrick?
A. Yes, sir.
Q. What time did you commence your employment under Mayor Fitzpatrick?
80 A. In April, 1892.
Q. What did you do before that?
A. I was book-keeper in the treasurer's office.
Q. How long were you book-keeper there?
A. From August, 1890, to 1892.
Q. Did you occupy any previous position to that in the city hall?
A. I did.
Q. What position?
A. From 1881 to 1884 I was in the treasurer's office, in 1885 I was in the comptroller's office, '84 and '85.
Q. You are perfectly familiar, then, with the manner and mode of doing business with the city of New Orleans, both in the comptroller's and treasurer's offices?
A. Yes, sir.
Q. You have seen the books, handled the books and know all about them?
A. Not so much in the comptroller's office as in the treasurer's office.
Q. Have you had occasion to be appointed an expert to examine the accounts between the city of New Orleans and the school board at any time?
A. Yes, sir, I have made up a statement of the taxes collected and the amount of taxes, from '73 to '78, amount of taxes collected.
Q. Look on there and see if you recognize the report that you made to the court after your appointment?
A. Yes, sir, this is the original report.
Q. As drawn up by you?
A. Yes, sir.

Counsel for complainant offers in evidence a copy of the original report referred to by witness and made by him, to be marked 13, which it is agreed will be accepted by the city if upon examination it is found to be a correct transcript of the original.

Q. In this report which you have made the court, when do the school tax of '71 and '73——
A. I do not think I have '71.
Q. I will ask you for '73, when did the collection of taxes for

1873 cease to have been paid over by the city of New Orlea
school board?

A. I see here March 25th, 1873, to March 2nd, 1876.

Q. On that date the city ceased paying the school tax for
the school board?

A. They quit proportioning the tax for March 2nd, 187
as the tax of 1873 was concerned.

Q. Have you not had occasion to examine the reports w
printed and published at the end of every six month
81 comptroller's office, to show what they have done wi
taxes of 1873, tax of 1873?

A. I know for a fact from my employment in the comp
office, that the tax of '73 is not divided but it is just bulke

Q. In other words, the city has kept the whole of the co
since the 2nd of March, 1876?

A. Yes, sir; I know about that.

Q. You have a condensed statement in this report wh
hold before you, made to the court, which total amounts of
years of the school tax have been collected by the city of
leans for the years '73 to March 2nd, '76?

A. Yes, sir.

Q. 1874, '75, '76, '77, '78 to November 1st, 1895?

A. Yes, sir.

Q. Please tell us what is the total amount of taxes colle
school purposes by the city of New Orleans during these
years in total—before you answer that question, how did
at the school tax?

A. This you will find here, I think. The State law de
the city of New Orleans to levy a certain tax for school
which the city of New Orleans did in each of those years.

By Mr. McLOUGHLIN:

Q. What you took, though?

A. I took the tax levied. I know for a fact what tax
lected for all——

By Mr. SAUNDERS:

Q. You took the ordinance?

By Mr. McLOUGHLIN:

Q. Did you go by the ordinance or the State law?

A. I know that the ordinance complied with the State
know when the taxes of these several years, '74, '75, '76, '77
as tax collector and book-keeper I know how the divisio
made. There was so much of the total tax set aside for sch
poses and deposited to a special account for school purpose

By Mr. LOUQUE:

Q. What is the total amount of the school tax collected?

A. $1,554,131.81.

Q. What was the proportion of cash which was collected

A. Cash received and deposited to the credit of schools, $1,477,032.66.

Q. What was the proportion of school certificates which were cancelled, received in payment of taxes and cancelled?

82 A. They were received for taxes. $69,991.99.

Q. Does that include all school certificates received by the city of New Orleans in payment of school taxes up to the first of November, 1895?

A. It included all that appeared on the treasurer's books

Q. All the city received on the treasurer's books?

A. Yes, sir.

Q. Didn't they put everything on the treasurer's books?

A. I suppose they did.

Q. You don't suppose they were received and not entered on the books?

A. No, sir; I can't say about that; I only know about the books.

Q. Deducting the money paid to the school board in cash, adding the certificates of schools cancelled, and deducting this sum total of these two figures from the amount of the tax, what would be the difference?

A. I find a difference of $7,107.16.

Q. What is that difference?

A. $7,107.16.

Q. Yes; but what does that represent, does it represent a deficit or a surplus?

A. There was $7,107.16 turned over more than collected.

Q. What date?

A. From 1878 to 1895.

Q. By looking over this report will you state whether every year there is an excess of collection or whether in some there is an excess of disbursements over collections?

A. You take the tax of '73, that appears to have been all cash. There was $309,872.12 collected and there was $309,872.12 deposited to the credit of schools, 1873.

Q. That is up to what time?

A. Up to March 2nd, 1876.

Q. Since that time, so far as the tax of 1873 is concerned——

A. I don't find any credit on the books of the treasurer's office.

Q. For the tax of 1874?

A. The total tax collected was $302,741.91—cash deposited $284,281.57. Certificates of 1874 received for taxes $31,141.89, making a total credit of $315,423.46. I want to explain this in this way—while you find for 1874 the collection was only $302,741.91 cash and certificates you received was $315,423.46 that occurs in this way—a person had a right if they came in to pay 1874 tax, they had the right and the treasurer was compelled to receive school certificates of 1876 or 1877 in payment of the school portion of the tax of 1874. You will find '74 and '75 is in excess that way, while '76, '77, '78 are just the reverse.

83 Q. There is an excess of $7,100.00 according to this report, of money collected over money paid to the school board?

A. I don't know that. There is a discrepancy betwee
tificates and cash received from the total amount colle
1873 to 1878, whether that is in certificates or in cash
been accounted for.

Q. There is a surplus there of $7,100.00 for money coll
money paid?

A. No, there appears to me a deficit.

Q. I don't see that.

A. The tax is $1,554,131.81 and $1,547,024.65 deposi
credit of schools and the certificates taken——

Q. If you collect $1,554,131.81——

A. And only pay $1,547,024.65, that is not any surplus

Q. What do you call it?

A. I don't pay over enough.

Q. Therefore you owe to the school board $7,107.16?

A. Yes, sir. But you asked me if it was not a surplus.

Q. Yes, a surplus collected over amount paid?

A. Yes, sir. I want to be correct about it.

Q. When you say deficit you don't mean to say that
New Orleans had paid out more money than she collecte
ing to this?

A. It is just to the contrary. $7,107.16 is the differenc
the amount of taxes collected and the amount of cash de
the credit of schools and certificates received in payment
taxes of those years.

Counsel for complainants offers in evidence the who
report, to be substituted by a copy subject to the same ob
counsel for the city.

Q. Have you had occasion to examine the comptroller
from 1881 to 1895, so far as the school tax is concerned?

A. I have done that at your request recently.

Q. Let us see the result of your examination.

By Mr. McLOUGHLIN:

Q. What years has the city paid over to the school bo
money than she has collected?

A. '74 and '75.

Q. Those two years she paid over more?

A. No, not paid over more, that excess appears in this
explained.

By Mr. LOUQUE:

Q. You don't understand Mr. McLoughlin's question.
you what years has the city paid over more money——

84 By Mr. McLOUGHLIN:

Q. There are some years that the city paid to the sch
more money than she has received for taxes——

A. This statement will make it appear that the school

while only $302,741.91 there was $315,423.46 in cash and certificates of those years redeemed by the city of New Orleans.

Q. I understand now, those certificates mean the certificates of '74?

A. Yes, sir.

Q. So that for the school expenses incurred during '74 the city has overpaid about $13,000?

A. Yes, sir.

Q. She has paid out $13,000?

A. I can't say that she has paid out because the city might have received this in certificates for tax of '76.

Q. Then this statement is not so accurate?

A. Yes, sir, it shows exactly, with my explanation I think it ought to, because the tax of '74 was paid in cash or in certificates at the option of the tax-payer, but the law compelled the treasurer to receive those certificates of '76 or '77 or '78 in payment of the tax of '74 at that time, therefore the cash and certificates received does not balance with the total amount of taxes collected for that year or for any of the years.

Q. So that the accounts do not show what years certificates received were issued for, in other words, if you received during a year in payment of school tax, $50,000 school certificates, does that report show for what year those certificates were originally issued for?

A. Yes, sir, I have that here. In 1874 the city collected cash—out of $302,741.91, $284,281.57 that was cash received by the city and deposited to the credit of the school board—in addition to that cash she received, the city took in for taxes $31,141.89 of school certificates of '74.

Q. Then, that is 1874?

A. Yes, sir.

Q. Then consequently that year you received certificates of '74 and cash which added together exceed the school proportion?

A. No, sir, not the proportion.

Q. The collection of taxes——

A. The school tax collected by the city——

Q. In other words, the city is short $13,000 of that year?

A. Yes, sir. You take the total levy of '74 which was $327,386.14, the total collections were $302,741.91, so it is not more than was levied for school purposes, but the schools for '74 got credit in cash and certificates for more than the tax collected by the city of New Orleans and it was in that manner in receiving certificates of '74 for taxes for other years——

85

By Mr. LOUQUE:

Q. That is the principal of the tax?

A. Yes, sir.

Q. Now, to go back again. The question is—have you had occasion to examine the comptroller's reports in relation to the school tax from '81 to '96?

A. I did so at your request.

Q. Now, will you please state how these reports which contain the budgets of the city of New Orleans and the budget of the revenues, also the rate of taxation, how the rate of taxation was divided for the years '71, '73, '74, '75, '76, '78?

A. Either one of these reports will show that.

Q. Do those reports show it as a fact?

A. Take the report of January 1st to June 30, 1895, from page 98 to 108 gives the tax levy of the city of New Orleans.

Q. As a matter of fact, was the tax levy just according to this division which was made in that report?

A. Yes, sir.

Q. For these years '71 to '78?

A. Yes, sir.

Q. Was there any tax levy for '72 called by the name of 1872?

A. No, sir, there was no tax called by the name of 1872 or by the city of New Orleans.

Q. The taxes are '71, '73, '74——

A. Then run regularly up to the present year.

Counsel for complainant offers in evidence, in the first place, the comptroller's reports from '81 to '96 inclusive—is there one of them missing?

A. The latter half of '82 from July to December, '82.

Q. You don't make any calculation on that?

A. No, sir.

Q. You left that out?

A. Yes, sir.

Q. As a matter of fact did the city of New Orleans ever pay to the school board any of the interest which had been collected by them on the taxes?

A. No, sir, not to my knowledge.

Q. Will you please state if you have made a calculation of the interest on the school tax from '81 to '96, on school taxes collected by the city?

A. Yes, sir, that is the report I made at your request. School taxes collected January, '81, to December, 1896.

86 Q. Will you please state what time you stopped counting interest during what period, these reports were made every six months?

A. Yes, sir.

Q. Did you count the interest at the end of the six months or at the beginning?

A. I have made a statement, that shows exactly how many years and months I calculated the interest.

Q. You might as well tell us?

A. Well, I can't.

Q. Please state that this is the amount of interest not charged on the amount, charged to the city on the amount that she has received, but charged on the school taxes?

A. I have taken extracts from the books here. The date the tax was collected, then I have made up an estimate of the interest on

that portion of the tax from date of delinquency until date of payment or until near the time of payment.

Q. But that is the interest which the tax-payer was to pay to the city of New Orleans?

A. Yes, sir, the interest that the tax-payer—whether the city collected it or not this don't show.

Q. What is the amount that you have figured for varicus years?

Counsel for complainant offers the report in evidence.

A. For 1874, the interest would be four——

By Mr. SAUNDERS:

Q. What interest is that?

A. The tax-payer's interest on the 31st of March of each year—now the city collected some of the interest but all she didn't collect, but it appeared against the tax.

Q. And that interest that was paid by the tax-payers is shown on that statement?

A. No, sir, this statement shows what interest would accrue on that portion that belonged to the school at the date of payment.

By Mr. LOUQUE:

Q. As a matter of fact, some of that interest was paid to the city of New Orleans?

A. Yes, sir, but very little.

Q. Others not paid?

A. Yes, sir.

By Mr. SAUNDERS:

Q. In other words, this is an attempt to charge the city with interest that it should have collected, but did not?

A. Whether she did not, I don't know. Some of it has been collected. A small part of this interest was collected.

87 Q. Give us the years.

A. '74, $4,732.75; '75, $6,465.75; '76, $5,847.58; '77, $3,839.70; '78, $4,434.57; total, $24,859.25.

Counsel for complainants offers in evidence the report made by Mr. Steen and marked Exhibit 14, subject to the objections of counsel for City of New Orleans.

By Mr. SAUNDERS:

Q. Did you state there was outstanding and unpaid $211,000 00 in school certificates?

A. No, sir. I didn't state that because I was only on the tax. If you will take up my report you will find—for instance, you take '74. Estimates of receipts by the board was $456,100, possible receipts from the State as per estimate, $75,000; city of New Orleans as per tax levy being ¼ of one per cent. on the assessment of $327,386.14, making the total possible receipts $402 386.14.

By Mr. McLOUGHLIN:

Q. Are you familiar with the way these things were paid?

A. All these school certificates?

Q. Yes. Did the school board ever pay any certificate directly itself?

A. Oh, yes, sir, because they used to receive cash.

Q. They would pay them with cash?

A. Yes, sir.

Q. Did they ever buy up any certificates for less than dollar for dollar?

A. The report will show that. Paid face value $5,910.30 for $6,157 in certificates.

Q. They were in the habit of discounting their own certificates occasionally?

A. Yes, sir, they bought them up.

Q. That was the school board that did that?

A. It was under the direction of the school board. These purchases were made by the treasurer who was the treasurer of the city of New Orleans.

Q. Have you got anything in there of the poll taxes that were turned over to the school board, any statement of that?

A. I don't think so.

Q. You have there a judgment there, there is a judgment in connection to this report on which I suppose you figured?

A. That was a mandamus.

Q. Which adjudges that the State is responsible for 40% of certain certificates?

A. Yes, sir.

88 Q. What years are those that the State was responsible for 40% of the outstanding——

A. It is under some act.

Q. I know the act. I want to see whether you can tell me what years they are.

A. For the following amounts——

Q. What years?

A. I am going to get to that. 12 and 9 10% of the amount of the certificate- for '75; 40 and 4 10% of the amount of the certificates for 1876 and for the full amount of the certificates for 1877 1878 and 1879.

Q. That is the judgment saying the State is responsible for those percentages of those years?

A. Yes, sir.

W. H. MICHEL, witness sworn and examined on behalf of complainant, testified as follows:

Direct examination by Mr. LOUQUE:

Q. What position did you occupy in the city hall within the last four years?

A. Chief clerk of tax bureau department of the treasurer.

Q. Mr. Michel, have you had occasion to make an examination of

he sheriff's office to see what property had been sold by the city of ew Orleans for taxes prior to '78?

A. At your request I started to make an examination from the onveyance and mortgage office but the books and things were in a ondition in the sheriff's office that I didn't get to them, from the act that after reporting to you, we concluded that it was useless to nake further research in the matter.

Q. Will you please state how many pieces you investigated?

A. I investigated about five, out of the first sale of 16 pieces.

Q. What was the result of the examination?

A. They were all paid and transferred to other parties, the prop- rties have all been transferred.

Q. Do you mean the tax was cancelled?

A. The tax was cancelled and the sales were evidently cancelled om the fact of the continued transferred.

Q. In all five of them?

A. Yes, sir.

Q. And it was at this stage of your examination that you made report to me?

A. Yes, sir.

Cross-examination by Mr. McLOUGHLIN:

Q. What proportion do these 16 bear to the total amount?

A. I didn't go into such an examination.

Q. Was 1-10, 1-20 or what?

A. I didn't calculate it.

Q. You have no idea how many pieces of property were sold?

A. No, sir, it was simply a verbal report.

Q. It would be of little value as far — testifying?

A. That is a question I can't answer.

Q. How long have you been in tax collections?

A. About eight years and three months.

Q. You reported on five sales out of an examination of 16?

A. They were sales made by the sheriffs previous to 1879, not osequent to 1879.

Q. Have you any idea how many tax sales similar to those 16 re made by the sheriff?

A. I have not, sir; I saw two sales of the sheriff, I took five pieces m the two sales and made an examination of the five pieces I made my report to Mr. Louque and he came to the conclusion re was no further use to make any further examination.

By Mr. LOUQUE:

Q. What was the total amount of these taxes due to the City of w Orleans on those five pieces you investigated?

A. I didn't take down the amount, we just made that special ex- nation as to whether we should proceed in the full examination ll the sales made by the sheriff and we came to the conclusion it would be useless.

Counsel for complainant offers in evidence the two judgments the case of Gasquet and Joseph Ventor, and the two judgme marked "A" and "B."

Testimony of Chas. A. Aitkens, Expert for City of New Orleans.

Referred to in complainant's note of evidence, offered by compla ant, and filed January 22, 1898.

United States Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

Testimony taken in the above numbered and entitled cau
90 on the part of defendant on the 1st day of May, 1897, the archive-room of the city hall, by consent of counsel f the complainant and defendant.

Appearances.

James McLoughlin, for the city.
Louque & Pomes, for complainant.

CHARLES A. AITKINS, witness produced by defendants, was e amined by Mr. Louque:

Q. Mr. Aitkins, you have been appointed an expert on the pa of the City of New Orleans in this matter, have you not?

A. I was appointed an expert, as stated to me by Mr. McLoug lin, for the purpose of examining into the correctness of figur made by Mr. Stewart and Mr. Steen. It was a verbal appointme by Mr. McLoughlin.

Q. How many days have you been at work on this report?

A. A little over two weeks, I commenced on the 13th day April and ended on the 1st day of May. I have done a great de of night work and Sunday work, too.

Q. Have you, after making an examination of the report whi was submitted to you as made by Clark Steen and the report Henry Stewart, come to a conclusion?

A. I have.

Q. Will you please state in relation to the report of Clark Stee what difference you find in his report and your examination?

A. $157.72 less than the report made by Mr. Steen, making th sum of $6,949.44.

Q. In relation to the report of Henry Stewart, how much scho taxes have you found collected by the City of New Orleans fro the second of March, 1876, at which date the payments of that ta by the city to the school board ceased, up to the 31st of Decembe 1896?

A. $7,820.89.

Q. Please state the sum of the collections for the same dates f the school tax of '73.

A. $8,409.39. The foregoing two amounts were taken from the books of the city treasurer and comptroller by Mr. Stewart, I have examined same and found them correct.

Q. In relation to the interest actually collected by the City of New Orleans on the school tax of the different years from '71 to '78, what is the total amount of interest received by the City of New Orleans?

A. During those years, there is not any special interest on
91 school-tax account, there is an interest account for those years for the total city tax and if the same proportion of interest account for those years was taken as was given to the school fund for those years, the interest on school tax would amount, as far as I have been able to ascertain, to the sum of $46,859.70.

Q. Have you made a report of the detail amount for each year?

A. I have. It is included in my report as shown by this document (witness refers to report made by him which he holds in his hand and is restifying (testifying) from). The interest collections for the years '71 to '78 both inclusive, were taken from the books of the city treasurer and comptroller, by Mr. Stewart—I have examined same and found them correct.

Q. In making this summary did you increase the '71 interest?

A. I did not.

Q. By adding the amount of increase which the '71 tax ought to produce, that would give you an increase of $1,100, approximately?

A. I have not had time to go into a very thorough examination of this and have estimated that the interest account for the year '73 includes about $60,000 of interest collections on the tax for '71—now, as the difference between the percentage of school tax for those two years is about 22 % in favor of '71, the addition of that percentage would increase it about $13,200, 1 12 of which, the proportion of school tax for the year '73, would then make the amount of interest on the school-tax collections, $1,100 more. The interest therefore amounts to $47,959.70.

Q. Please give me the total amount of Mr. Steen's report as corrected by you, the tax of '71, the tax of '73, the interest up to the 24th of January, 1881, and the 11 dollars addition.

A. $71,139.52. At the request of Mr. McLoughlin I have examined the books of the city treasurer and of the school board for years subsequent to '78 and on both books I find that $51,186.67 had been paid to the board in excess of budget for '79 and that $242.09 had been returned to the city on account of this overpayment, leaving a balance of $4,876.58 due by the board to the city for the year '79.

Report of Charles A. Aitkins is offered in evidence by counsel for complainant.

Judgment in favor of Mrs. M. M. Fisher for $8,097.17, copied at
92 page 75 of this transcript.

Master's report on claim, copied at page 34 of this transcript.

Certified copy of petition, answer, supplemental answer, peremp-

tory exception, plea of prescription and judgment, in the ca
F. J. Gasquet *vs.* Board of Directors of the City Schools, No. 3
civil district court, parish of Orleans, Div. "B," filed April 2,
with intervention of F. J. Gasquet, and noted in complainant's
of evidence.

(Cancelled law stamp.) (Cancelled law stam

UNITED STATES OF AMERICA, }
State of Louisiana. }

Civil District Court for the Parish of Orleans.

I, Paul O. Guerin, clerk of the civil district court for the p
of Orleans, do hereby certify that the annexed documents are
and correct copies of the originals on file and of record amon
archives of my office in the matter entitled F. J. Gasquet *vs.* B
of Directors — the City Schools, under number 35156 of the d
of this honorable court.

In testimony whereof, I have hereunto set my hand and af
the seal of the said court, at the city of New Orleans, on
eighteenth day of January, in the year of our Lord one thou
eight hundred and ninety-seven, and in the 121st year of the
pendence of the United States of America.

(Signed) PAUL O. GUERIN, *Cl*

I, F. A. Monroe, presiding judge of the civil district court fo
parish of Orleans, do hereby certify that Paul O. Guerin is the
of said court, that the same is a court of record, having pr
jurisdiction, and that the signature, Paul O. Guerin, clerk, t
foregoing certificate is in the proper handwriting of him, the
Paul O. Guerin, clerk; to his official act as such, full faith
credit are due and owing; and I do further certify that his at
tion is in due form of law.

Given under my hand, at the city of New Orleans, on the
day of January, in the year of our Lord one thousand eight
dred and ninety-seven.

[SEAL.] (Signed) F. A. MONROE, *Ju*

I, Paul O. Guerin, clerk of the civil district court fo
93 parish of Orleans, do hereby certify that F. A. Monroe, w
genuine signature appears to the foregoing certificate, is
and was at the time of signing the same, presiding judge o
civil district court for the parish of Orleans, duly appointed
commissioned and qualified as such, and that said attestation
due form of law.

Witness my hand and the seal of said court, this 18th d
January, 1897.

(Signed) PAUL O. GUERIN, *Cl*

(Six cancelled law stamps.)

Petition. Filed February 25th, 1892.

To the hon. the civil district court for the parish of Orleans:

The petition of Francis James Gasquet, who resides temporarily in this city and a citizen of the State of New York, respectfully represents:

That your petitioner is the owner and holder of a number of school certificates due to him individually and also transferred to him amounting to forty-six thousand seven hundred and sixty-two 06 100 dollars, as more fully appears by said certificates and a full list thereof, hereto annexed and made part hereof.

That said certificates were issued for the unpaid salaries of school teachers and expenses of maintaining the public schools of the city of New Orleans, for the years subsequent to 1872, and prior to January, 1879.

That the liability represented by said certificates was incurred by the Board of Directors of the City Schools, a corporation duly created by the laws of Louisiana, and a citizen of said State.

That said certificates are made payable out of the school tax levied by the city of New Orleans prior to 1879; that said certificates are still due and remain unpaid.

Wherefore petitioner prays that the Board of School Directors of the City School- of the City of New Orleans, through E. B. Kruttschnitt, Esq., president thereof, be cited hereto and after due proceedings that judgment be rendered in favor of your petitioner and against the said board, for the sum of forty-six thousand six hundred and forty-two 06 100 dollars, with legal interest from judicial demand and all costs of suit, payable out of the school tax levied by the city of New Orleans, prior to 1879, and petitioner prays for general relief, &c.

(Signed) CHAS. LOUQUE, *Att'y.*

94 *Answer. Filed March 2nd*, '92.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

Now comes into court The Board of Directors of the City School- made defendant herein and reserving the benefit of any and all exceptions to which it may be entitled for answer to plaintiff's petition denies all and singular the allegations in said petition contained.

Wherefore defendant prays to be hence dismissed with judgment in its favor and for costs.

(Signed) CARLETON HUNT,
City Att'y, ex Officio Att'y Board of Directors of the City School.

No. 35156.

Civil District Court, Div. "B."

Now into this hon. court comes The Board of Directors o
Schools, made defendant herein, and with leave of court fi
tained for the filing hereof, and for supplemental and amend
swer to plaintiff's petition, says:

That defendant reiterates the answer hereinafter filed, an
further and supplemental answer, says:

1st. That this defendant is not responsible for any of the ac
or done, nor any of the debts incurred by the board of s
directors, which issued the certificates which are herein su
and that no judgment can be rendered against this defe
thereof.

2nd. That under the provisions of law regulating the f
board of school directors, the certificates which they issued
only be paid out of the funds collected from the school ta
the various years set forth in plaintiff's petition and that the
ancient are required to be paid first before subsequent certif
can be paid, and subsequently, that a judgment *in solido* as p
for by plaintiff, would be in violation of law.

Wherefore defendant prays for leave of court to file this su
mental and amended answer, and after due trial, that the
judgment in its favor and against plaintiff, dismissing this suit
cost, and defendant prays for general and equitable relief.

And defendant as in duty bound will ever pray.

(Signed) E. A. O'SULLIVAN, *City A*

95 *Order.*

Let this supplemental and amended answer be filed as p
for, and according to law.

New Orleans, May 2nd, 1892.

(Signed) FRED. D. KI

F. A. GASQUET
vs.
BOARD OF DIRECTORS OF CITY SCHOOLS.

Now into this honorable court comes the Board of Directo
City Schools, and peremptorily excepts to this action, and for
of exception, says:

1st That the plaintiff's petition sets forth no cause of a
against this exceptor.

2nd. That this action, if any lies, is barred by the prescripti
ten years.

Wherefor- exceptor prays that these exceptions be maintaine
this suit be dismissed at plaintiff's cost.

E. A. O'SULLIVAN, *City A*

Civil District Court, Div. "B."

F. J. GASQUET
vs.
BOARD OF DIRECTORS THE CITY SCHOOLS. } No. 35156.

Now comes defendant and pleads in defense of this action that the instruments herein sued on are prescribed by the prescription of five years.

Wherefore defendant prays that this plea be maintained and this suit dismissed at plaintiff's cost, and for general relief.

E. A. O'SULLIVAN, *City Att'y.*

Judgment.

The rule herein taken by plaintiff to have judgment rendered in accordance to the opinion of the supreme court herein filed came on this day for trial.

Present: Louque & McGloin, attorneys for plaintiff; defendant absent and not represented.

96 When after hearing pleadings, evidence and counsel, the law and the evidence being in favor of the plaintiff and for the reasons orally assigned,

It is ordered that the said rule be made absolute and accordingly that the following judgment be rendered.

It is ordered, adjudged and decreed that there be judgment in favor of plaintiff, F. J. Gasquet, and against defendant, The Board of Directors of the City Schools, in the sum of forty-four thousand nine hundred and seventy eight 74/100 dollars ($44,978.74/100) with legal interest from judicial demand and costs of suit payable out of the school taxes levied by the city of New Orleans prior to 1879.

That said Board of Directors of the City Schools do pay to plaintiff the aforesaid sum of forty-four thousand and nine hundred and seventy-eight 74/100 dollars ($44,978.74/100), upon the surrender of the certificates herein sued on by plaintiff and defendant to pay costs.

Judgment rendered March 20th, 1893.

Judgment signed April 17th, 1893.

(Signed) FRED. D. KING, *Judge.*

A true copy.

[SEAL.] (Signed) P. J. KELLY, *Dy Clk.*

Master's Report upon Judgment in Favor F. J. Gasquet.

Copied at page 34 of this transcript.

Judgment in favor of Mary Quinlan in case of Mary Quinlan *vs.* Board of Directors of the City Schools; No. 53102, civil district court, parish of Orleans.

Referred to in complainant's note of evidence and filed December 29, 1897.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I hereby certify, that on the 26th day of November, 189 ment was rendered in this court in the following-entitled the words and figures following, to wit:

(Cancelled law stamp.)

MARY QUINLAN
vs.
BOARD OF DIRECTORS OF THE CITY SCHOOLS. } No. 53

This case came on for trial this day.

97 Present: Chas. Louque, Esq., for plaintiff, and J. Loughlin, Esq., for defendant.

When after hearing pleadings, evidence and counsel, the l evidence being in favor of plaintiff and for the reasons or signed by the court,

It is ordered, adjudged and decreed that there be judgr favor of plaintiff Mrs. Mary Quinlan and against the Bo Directors of the City Schools for the sum of five thousan hundred and seventy-three 78 100 dollars and costs.

Judgment rendered November 26th, 1897.

Judgment signed December 2d, 1897.

(Signed) T. C. W. ELLIS, J

In testimony whereof, I have hereunto set my hand and the seal of the said court, at the city of New Orleans, this day of November, in the year of our Lord one thousand eig dred and ninety-seven.

[SEAL.] (Signed) PAUL O. GUERIN, C

Judgment in favor of Jean Pomes in case of Jean Pon Board of Directors of the City Schools, No. 52950, civil distric parish of Orleans.

Referred to in complainant's note of evidence and filed De 20, 1897.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I hereby certify, that on the 26th day of November, 1897 ment was rendered in this court in the following-entitled the words and figures following, to wit:

(Cancelled law stamp.)

JEAN POMES
vs.
BOARD OF DIRECTORS OF THE PUBLIC SCHOOLS, PARISH of Orleans. } No. 52950.

This case came up for trial on this day.

Present: Chas. Louque, Esq., for plaintiff; J. J. McLoughlin, Esq., for defendant.

And after hearing pleadings, evidence and counsel, the law and the evidence being in favor of plaintiff and against the defendant and for the reasons orally assigned,

It is ordered, adjudged and decreed that there be judgment in favor of plaintiff, Jean Pomes, and against the defendants, The Board of Directors of the Public Schools, Parish of Orleans, for the sum of six thousand three hundred and fifteen 73 100 dollars with legal interest from judicial demand until paid and all costs of suit, the whole payable out of the school taxes for the years prior to 1879, when collected by the city of New Orleans.

Judgment rendered November 26th, 1897.

Judgment signed December 2d, 1897.

(Signed) F. A. MONROE, *Judge.*

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, this second day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

[SEAL.] (Signed) PAUL O. GUERIN, *Clerk.*

Judgment in favor of Georgiana T. Young in case of Georgiana Theresa Young, wife of Philip J. Friedrichs, and *al. vs.* School Board, No. 12339, civil district court, parish of Orleans.

Referred to in complainant's note of evidence and filed December 29, 1897.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I hereby certify, that on the 26th day of November, 1884, judgment was rendered in this court in the following-entitled suit, in the words and figures following, to wit:

(Cancelled stamp.)

GEORGIANA THERESA YOUNG, Wife of Philip J. Friedrichs, and *al.*
vs.
SCHOOL BOARD. } No. 12339.

This case fixed this day.

It is ordered, adjudged and decreed that the City of New Orleans pay to the several pl'ffs herein:

Georgiana T. Young.....
Lizzie G. Wheelright.....
Mary A. Sullivan.....
Francis Johnson, transferee of Mary O'Donnell.....

99 without interest and payable in accordance with sec. 2
No. 67 of 1884.
Judgment rendered Nov. 26th, 1884.
Judgment signed Dec. 2nd, 1884.
(Signed) F. A. MONROE, J

In testimony whereof, I have hereunto set my hand and
the seal of the said court, at the city of New Orleans, this fi
of December, in the year of our Lord one thousand eight h
and ninety-seven.
[SEAL.] (Signed) PAUL O. GUERIN, C

Judgment in favor of Mrs. Fortier in case of Mrs. For
Board of School Directors, No. 28801, second city court
Orleans.
Referred to in complainant's note of evidence and filed De
20, 1897.

(Cancelled law stamp.)
State of Louisiana,
Second city court of New Orleans.
Hon. Gabriel Fernandez, judge.

I hereby certify, that on the 22d day of October, 1897, ju
was rendered in this court in the following-entitled suit,
words and figures following, to wit:

MRS MARY FORTIER
vs.
BOARD OF SCHOOL DIRECTORS FOR THE PARISH OF Orleans. } No.

Claim filed June 23d, 1897.

Claim thirty-two dollars 19 100 cents as per petition and
certificate issued for November, 1876, to Miss M. Grace, 3d
the Webster school.
Citation issued and served June 25th, 1897.
Supplemental petition filed July 5 97.
Citation waived.
Answer of board of directors filed July 7th, 1897.
Notice of trial issued October 14th and served on 16, 1897.

This cause came on this October 22d, 1897, for trial; prese
Lougue, att'y for plaintiff; Jas J. McLoughlin, att'y for defe
when after hearing the law and the evidence and argum
counsel,

100 It is ordered, adjudged and decreed that there be judgment in favor of plaintiff, Mrs. Mary Fortier, duly authorized and transferee and against defendants, The Board of Directors of the Public Schools of the Parish of Orleans for the sum of thirty-two 16/100 dollars, it having been proven on trial of this case that the transfer of the certificate cannot be found, oral proof of transfer accepted by the court. Said judgment to bear interest at the rate of five per cent. per annum from June 23 '97, and costs.

(Signed) G. FERNANDEZ, *Judge*.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this 19th day of November in the year of our Lord one thousand eight hundred and ninety-seven.

[SEAL.] (Signed) CHAS. CUNEO, *Clerk*.

Court-house, 322 Exchange alley.

EXHIBIT PETITION OF JOSE VENTA IN CIVIL DISTRICT COURT, PARISH OF ORLEANS.

Filed April 2nd, 1897.

Civil District Court, Division "E."

JOSE VENTA
vs.
BOARD OF SCHOOL DIRECTORS. } No. 37364

Petition.

Filed May 26th, 1892.

To the honorable the civil district court for the parish of Orleans:

The petition of Jose Venta, a citizen of the Kingdom of Spain, residing temporarily in New Orleans:

Respectfully represents:

That your petitioner is the owner and holder of a number of school certificates due to him individually and also transferred to him amounting to seventeen thousand three hundred and eighteen 46/100 dollars as more fully appears by said certificates and a complete list thereof, hereto annexed and made part hereof.

That said certificates were issued for the unpaid salaries of school teachers and expenses of maintaining the public schools, for the years subsequent to 1872 and prior to January, 1879.

101 That the liability represented by said certificates was incurred by the Board of School Directors of this city, a corporation duly created by the laws of Louisiana and a citizen of said State.

That the same are made payable out of the school tax levied by the city of New Orleans prior to 1879.

That notwithstanding due demand the Board of Directors of the City Schools refuse to pay the same.

Wherefore petitioner prays that said Board of School Directors of the City Schools of the City of New Orleans be cited hereto and after due proceedings that the judgment be rendered in favor of your petitioner and against the said board for the sum of seventeen thousand three hundred and eighteen 46/100 dollars with legal interest from judicial demand and all costs of suit, payable out of the school tax levied by the city of New Orleans prior to 1879, and petitioner prays for general relief, &c.

(Signed) CHAS. LOUQUE, *Attorney.*

Civil District Court, Division "E."

JOSE VENTA
vs.
BOARD OF SCHOOL DIRECTORS. } No. 35932.

Answer.

Filed August 4th, 1892.

Defendants, reserving their exceptions heretofore filed, and reiterating the same, deny all and singular plaintiff's allegations and they specially aver that the documents annexed to his petition were not issued in accordance with law and the city ordinances, that defendants call for strict proof of the services, for which said certificates are alleged to have been issued; that no law or ordinances authorized the issuance of said certificates, and still less at the discretion or option of the pretended officer, who purports to have signed or indorsed the same, that no judgment can, in any event, be rendered against defendants, with whom no funds have been lodged or deposited to pay any such claims, even when duly authenticated and proven, and that the plaintiff's recourse, if he proves his claim satisfactorily, is against the trust fund under the administration of the city of New Orleans in accordance with the provisions of act of 1873, No. —, and of 1874, No. —.

Wherefore respondents beg leave to file this their answer and to have plaintiff's demand dismissed with costs.

(Signed) E. A. O'SULLIVAN,
ALBERT VOORHIES,
Attorneys.

102 *Order.*

Let this answer be filed as prayed for.
New Orleans, August 4th, 1892.

(Signed) GEO. H. THEARD, *Judge.*

Judgment.

Civil District Court, Division "E."

JOSE VENTA
vs.
BOARD OF SCHOOL DIRECTORS. } No. 35932.

This case being submitted to the court for adjudication, and the law and evidence being in favor of plaintiff with the exception of the following certificate, for which judgment of nonsuit is now rendered:

It is ordered that judgment be rendered in favor of plaintiff Jose Venta, and against the Board of School Directors for the City Schools of New Orleans, La., for the sum of seventeen thousand and six 27/100 dollars, payable out of the school tax levied by the city of New Orleans, prior to 1879, with legal interest from judicial demand, *i. e.*, May 26th, 1892, and costs of suit.

It is further ordered that judgment of nonsuit be entered as to the certificates of M. Sweeney for November, 1876—$53.64; Edmond Jones, 815-606, 8.94; M. O'Brien, 54-13, 98-40.02. M. L. Toad, 64-8.38, 55.62. G. Hodgkins, 48.35-6.23-42.12. A. Raymond, 14.40, 4.77-9.63. M. D. Cooper, 72.11-52.00. R. Wheeler, 18-5.96-12.04. M. T. Lindsay, 25-8.28-16.72. M. Callaban, 36-14.54, $21.46.

Judgment rendered Feb'y 27th, 1894.

Judgment signed March 5th, 1894.

(Signed) GEO. H. THEARD, *Judge.*

UNITED STATES OF AMERICA, }
State of Louisiana. }

Civil District Court for the Parish of Orleans.

I, Paul O. Guerin, clerk of the civil district court for the parish of Orleans,

Do hereby certify that the foregoing four pages do contain a true and correct copy of the petition, answer, order and judgment in case number 35932, entitled Jose Venta *vs.* Board of School Di-
103 rectors of the docket of this honorable court, division E, Honorable Geo. H. Theard, judge. The original- of which are now on file in the archives of this honorable court.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at the city of New Orleans, on this first day of April, in the year of our Lord one thousand eight hundred and ninety-seven and in the one hundred and twenty-first year of the Independence of the United States of America.

(Signed) PAUL O. GUERIN, *Clerk.*

I, F. A. Monroe, presiding judge of the civil district court for the parish of Orleans, do hereby certify that Paul O. Guerin is the clerk of said court; that the same is a court of record, having probate

jurisdiction, and that the signature, Paul O. Guerin, clerk, to the foregoing certificate is in the proper handwriting of him, the said Paul O. Guerin, clerk; to his official act as such, full faith and credit are due and owing; and I do further certify that his attestation is in due form of law.

Given under my hand, at the city of New Orleans, on the first day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

(Signed) F. A. MONROE, *Judge.*

I, Paul O. Guerin, clerk of the civil district court for the parish of Orleans, do hereby certify that F. A. Monroe, whose genuine signature appears to the foregoing certificate, is now, and was at the time of signing the same, presiding judge of the civil district court for the parish of Orleans, duly appointed and commissioned and qualified as such, and that said attestation is in due form of law.

Witness my hand and the seal of said court this first day of April, 1897.

(Signed) PAUL O. GUERIN, *Clerk.*

Offerings on Behalf of Mrs. Mary A. B. Gage, Intervener.

Master's reports, copies at page 32 *et sequiter*, and also at page 55 *et seq.* of this transcript.

104 Decree confirming master's report, copied at page 65 of this transcript.

Offerings on Behalf of U. Koen, Intervener.

Master's reports, copied at page 32 *et seq.*, and also at page — *et seq.*, of this transcript.

Decree confirming master's reports, copied at page 65 of this transcript.

Judgment of the civil district court for the parish of Orleans, division "D," in the suit entitled Urban Koen *vs.* Board of Directors of the Public Schools of the Parish of Orleans, No. 53833 of the docket thereof, copied at page 53 *et seq.* of this transcript.

Waiver and consent on intervener's petition herein, copied at page 54 of this transcript.

Defendant's Offerings.

Copies of all the budgets of the city of New Orleans showing estimated revenues and expenditures, for the years 1871 to 1879, inclusive.

Agreement as to Offer of Budgets of the City of New Orleans.

Filed July 5, 1898.

United States Circuit C'rt, Eastern District of La.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET ALS. } No. 12516.

In making up the transcript of appeal in this case the clerk is directed to omit the budgets of the city of New Orleans, showing estimated revenues and expenditures for years 1871 to 1879, inclusive; all parties hereto reserving the right of using the same in the appellate court, as they appear in the printed reports of the
105 comptroller of the city of New Orleans, or extracts therefrom.

(Signed) CHAS. LOUQUE.

All the record of suit No. 12060 in this court that has not already been offered by complainant, and particularly the *fi fa.*, garnishment, interrogatories and answers thereto of Charles H. Schenck, city treasurer and *ex officio* treasurer of the school board.

Record from State Court.

Filed Feb'y 23rd, 1892, in No. 12060, U. S. C. court.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Civil District Court for the Parish of Orleans.

Petition.

Filed May 22nd, 1890.

MRS. M. M. FISHER & HER HUSBAND
vs.
BOARD OF DIRECTORS OF THE CITY SCHOOLS OF NEW ORLEANS ET AL.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

No. 30262, Division "D."

To the honorable the civil district court for the parish of Orleans:

The petition of Mrs. M. M. Fisher, born Blackadder, duly authorized and assisted by her husband, M. M. Fisher, who appears herein for said purpose and joins his said wife herein, both citizens of the Kingdom of Spain, and residing in the island of Cuba,

Respectfully represents:

That your petitioner is the owner and holder of a number of school certificates in her own name and transferred to her, amounting in the aggregate to the sum of eight thousand and ninety-seven 17/100 dollars as more fully appears by said certificates and a complete list thereof, hereto annexed and made part hereof.

106 That said certificates were issued to the school teachers for work actually performed in teaching the children in the city of New Orleans, attending the public schools.

That said teachers were appointed by the board of school directors of this city — by said board employed for said purpose.

That said amount is actually due and owing and notwithstanding due demand the said board of school directors refuse to pay same.

That the State's portion has been paid, and the city's portion remains due.

That a tax called the school tax was ordered levied by the legislature under acts No. 48 of 1873, and 123 of 1874, to pay the same. That the city of New Orleans levied in accordance with said acts the said tax of 74 of 1 % during the years 1874, 1875 & 1876, and said tax is now still in process of collection.

That under the act of 1874, the city was ordered to keep said tax separate and apart for each year, but the same was mixed and mingled by the miscellaneous ordinances of the constitution of 1879, with all school taxes levied for years previous to 1880. Wherefore petitioner prays that the President of the Board of Directors of the City Schools of New Orleans and Jos. A. Shakespeare, mayor of New Orleans, be cited hereto and after due proceedings, that your petitioner recover judgment against the Board of Directors of the City Schools in the sum of eight thousand and ninety-seven and 17/100 dollars with legal interest from judicial demand payable out of the school tax, levied prior to 1879, by the city of New Orleans, and she prays for general relief, &c.

(Signed) CHAS. LOUQUE, *Attorney.*

Answer of City Attorney.

Filed June 2nd, 1890.

MRS. M. M. FISHER & HER HUSBAND
vs.
BOARD OF DIRECTORS OF THE CITY SCHOOLS OF NEW ORLEANS ET AL.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

No. 30262, Division "D."

Now comes into court the defendants, and reserving the benefits of any and of all exceptions to which they may be hereinafter entitled, for answer to plaintiff's petitions deny all and singular the allegations in the said petition contained.

Wherefore defendants pray for judgment in their favor and that said petition be dismissed with costs.

107 And defendants will ever pray as in duty bound.

(Signed) CARLETON HUNT,
City Attorney, ex Officio Att'y for Defendants.

Judgment.

Civil District Court for the Parish of Orleans, Division "D."

MRS. M. M. FISHER & HER HUSBAND
vs.
BOARD OF DIRECTORS OF THE CITY SCHOOLS OF NEW ORLEANS *et al.* } No. 30262.

The law and the evidence being considered and for the reason on file,

It is ordered, adjudged and decreed that there be judgment in favor of the plaintiffs, Mrs. M. M. Fisher, recognizing her as a creditor of the school fund of the city of New Orleans, for the sum of eight thousand and ninety-seven 17/100 dollars, with legal interest from judicial demand, till paid, to be paid in due course out of the school tax levied prior to 1879.

Judgment rendered June 23rd, 1891.

Judgment signed June 29th, 1891.

(Signed) N. H. RIGHTOR, *Judge.*

UNITED STATES OF AMERICA,
State of Louisiana.

Supreme Court of the State of Louisiana.

NEW ORLEANS, MONDAY, *January 4th*, 1892.

The court met pursuant to adjournment.

Present: Their honors Charles E. Fenner, Lynn B. Watkins, Samuel D. McEnery, Joseph A. Breaux, associate justices.

Absent: Edward Bermudez, chief justice.

His honor, Mr. Justice Breaux, pronounced the opinion and judgment of the court in the following cases:

Filed February 23rd, 1892.

MRS. M. M. FISHER & HER HUSBAND
vs.
BOARD OF DIRECTORS OF — NEW ORLEANS ET AL. } No. 10888.

Appeal from the civil district court for the parish of Orleans.

108 Plaintiff sues as owner of school certificates to recover the sum of eight thousand and ninety-seven 17/100 dollars, with legal interest from judicial demand.

These certificates were issued to teachers in 1874, 1875 and 1876

by the board of directors of the public schools for salaries earned during those years.

The petitioners pray for a judgment against the Board of Directors of the City Schools payable from the school tax levied prior to 1879, by the city of New Orleans.

The defendants deny any indebtedness.

Judgment was rendered recognizing plaintiff as a creditor of the school fund of the city of New Orleans for the amount claimed with legal interest from judicial demand, to be paid in due course, out of the school tax levied prior to 1879.

From this judgment the School Board and Mayor of the City of New Orleans appeal.

Plaintiff does not contend that her certificates are due by the City of New Orleans, but sues, she states in her brief, "to have whatever claims she has against the school fund recognized and paid whenever the city (is) *if* enabled to collect those funds.

Under the school law as it was when those certificates were issued the city cannot be held as a*n* debtor of the said plaintiff.

The school board was an independent authority organized under a separate act of incorporation vesting them with distinct functions, free from all other local government.

The schools were not city schools, but schools established by the State to instruct the children in the several parishes.

They were styled the common school- of the State and were placed under the management of a "State board of directors."

The State was divided into six school divisions and superintendents were appointed in each with salaries payable by the State treasurer out of the public school fund.

The members of the school board for the city *was* (were) appointed by the State board of education.

Those boards employed teachers, fixed salaries and incurred expenses for which they were responsible.

They also issued certificates to teachers, representing their salaries.

The statute required an estimate of debts and expenditures by this board in October, each year, which was submitted to the city council.

The latter complied with the requirements and during the years 1874, 1875 and 1876, the sum of $844,677 was collected for the schools, and there was deposited in the hands of the school treasurer an amount of cash and certificates which more than balanced the said amount collected.

109 The records disclose that in compliance with an ordinance to carry into effect provisions of act 49 of the General Assembly of 1880, the authorized officers of the city of New Orleans received in payment of municipal taxes due anterior to 1879, a part of the school certificates prior to that year.

There are uncollected balances for the schools due by tax debtors which will form a part of the fund for the payment of teachers' salary of 1874, 1875 & 1876.

The question is one of recognition of the claim *vel non*.

Judgment against the school board recognizing the claim serves every purpose of a recognition.

This body has authority to pass on the validity of any evidence of indebtedness against the school fund, to stand in judgment, to institute and defend suits.

One of its creditors has no right of action against the city of New Orleans, to compel her to recognize the validity of a claim.

If she fails to comply with the law relating to schools funds, the board has authority to enforce compliance.

It is not suggested by the pleadings, there has been any failure in this respect.

This court has decided that there is "no privity between the city of New Orleans and the holders of school certificates, who are exclusively creditors of the school board."

Labatt *vs.* New Orleans, 38 Ann., 289.

The holders of these certificates had, under act 36 of 1873, the right to recover payment out of the funds in the hands of the school treasurer levied for the years during which the salary was earned.

Under that act the board, in contracting debts, was limited to the revenue of the year during which the salary was earned.

Similar restriction is contained in act 123 of 1874.

According to the term of the last-mentioned act the remainder after payment of the year for which collected was to be applied to the expenses of the succeeding year.

Under act 49 of 1880, school certificates issued for 1874, 1875, and 1876 were made receivable for any taxes due prior to 1879.

This had the effect of creating one fund for school indebtedness prior to said year.

Under the present law, act 81 of 1888, the Board of Directors have no authority to bind the city to the payment of any amount.

They administer school affairs without any possible control on the part of the city authorities.

The treasurer of New Orleans is *ex officio* treasurer of the board and receives all funds collected for the support of the public school.

110 Upon him devolves the payment of pay-rolls and evidence of indebtedness to teachers and other employees of the board.

He pays upon the order of the school board.

Judgment against the school board for recognition of the claims serves every needful purpose for which suit has been brought.

The judgment appealed from is amended by dismissing the claim against the city and affirming the judgment against the Board of School Directors.

As amended judgment is affirmed at appellee's cost.

Rehearing refused.

The judgment having become final the foregoing is a true copy of the original opinion and judgment rendered in the case of—

MRS. M. M. FISHER & HER HUSBAND
vs.
BOARD OF DIRECTORS OF THE CITY SCHOOLS OF NEW ORLEANS *et al.* } No. 108

February 10th, 1892.
(Signed) C. W. BUCHANAN,
Deputy Clerk

Syllabus.

The Board of Directors of the Public Schools of New Orleans ha
the control of the public funds placed in their charge for the ma
tenance of the schools.

It devolves upon the board to compel corporations to comply w
their ordinances levying taxes for the schools, if they fail to comp
with their obligations in this respect.

The Board of Directors of Schools has authority to stand in ju
ment to institute or to defend suits.

A creditor of the school board has no right of action against t
city of New Orleans to compel the city to recognize the validity
his claim.

School certificates of indebtedness by the Board of Directors
the Public Schools for the years 1874, 1875 and 1876 are not de
of the city of New Orleans and actions for the purpose of havi
them recognized as valid claims can be maintained against
school board as it is authorized to pass upon the validity of t
evidence of indebtedness of every one who alleges that he is
creditor.

The city of New Orleans turns over amounts collected for scho
to the treasurer of the school board. This officer notes the taxes
the different years an applies the amount to the payment of cert
cates from the taxes of those years from which the creditors are e
tled to payment.

A true copy.
(Signed) TH. BUISSON,
Deputy Clerk

111 *Citation. Issued Feb'y 23, 1892.*

UNITED STATES OF AMERICA, }
Eastern District of Louisiana. }

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

MRS. M. M. FISHER & HUSBAND
vs.
THE BOARD OF DIRECTORS OF THE CITY SCHOOLS of New Orleans. } No. 12060.

The President of the United States of America to E. B. Kruttschnitt, president of the Board of Directors of the City Schools of New Orleans, Greeting:

You are hereby summoned, to comply with the demand contained in the petition of which a copy accompa-ies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 23 day of February, A. D. one thousand eight hundred and ninety-two, and Independence of the United States of America the 116th year.

Teste:

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

Indorsed: No. 12060. United States circuit court, fifth circuit, eastern district of Louisiana. Mrs. M. M. Fisher and Husband *vs.* The Board of Directors of the City Schools of New Orleans. Copy of petition and citation inside to be served on —— ——.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Feb'y 23, '92, and on the 24th day of same month and year I served certified copy hereof and accompanying petition on the Board of Directors of the City Schools of New Orleans, by handing them to Hon. E. B.
112 Kruttschnitt, president of the board, in person, in New Orleans, La.

J. B. DONNALLY,
U. S. Marshal,
By JAMES R. PINNEGRE,
D'y U. S. Marshal.

Exceptions of City of New Orleans.

Filed March 12th, 1892.

MRS. M. M. FISHER ET AL. *vs.* CITY OF NEW ORLEANS. } No. 12060.

Now comes the City of New Orleans and for exception to plaintiffs' petition pleads:

That the plaintiff is not the owner of the judgment herein s on, and cannot sue thereon, and that the said judgment is ow by citizens of Louisiana and residents of New Orleans who have right to maintain an action herein upon said judgment against fendant, defendant being likewise a citizen of Louisiana and defe ant says that the names of the owners of the said judgment are forth in the exception previously filed herein, and defendant re to the same for the names in question.

That the judgment herein proceeded upon sets forth no caus action.

That no action will lie to enforce the judgment herein sued up That no action upon a judgment will lie in this court, except w the same is a foreign judgment in the sense that it has been dered in another country or State than the State of Louisiana where the debtor is dead and his estate is under administrat and that the action of plaintiff does not fall within either of categories.

Wherefore exceptor prays that the said exceptions be maintai and the plaintiffs' suit dismissed with costs.

(Signed) CARLETON HUNT,
City Attorne

113 *Fi. Fa. Issued Feb'y* 15, 1893.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Circuit, Hold Sessions in and for the Eastern District of Louisiana.

The President of the United States to the marshal of the east district of Louisiana or his lawful deputy, Greeting:

You are hereby commanded to demand from the Board of Dir ors of the City Schools of New Orleans the sum of eight thous and ninety-seven 17/100 dollars with 5 % interest per annum fr May 22, 1890, payable out of the school tax levied by the city New Orleans prior to 1879 and clerk's costs, $26.00, attorney's doc fee, $20, marshal's costs, cash, which Mrs. M. M. Fisher and husband, M. M. Fisher, lately recovered by judgment of the cir court of the United States for the fifth circuit and eastern distric Louisiana, and if the same be not paid on demand, that then

cause the same to be made out of the personal estate of the said Board of Directors of the City Schools of New Orleans in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said Board of Directors of the City Schools of New Orleans in your district, and that you have those moneys before our said court to render to the said Mrs. M. M. Fisher and her husband, M. M. Fisher, for the judgment aforesaid, on the 70 day from the date hereof, together with this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 15 day of February, A. D. 1893, and 117 year of the Independence of the United States.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

Indorsed: No. 12060. U. S. circuit court, eastern district of Louisiana. Mrs. M. M. Fisher *vs.* Board of School Directors. *Fi. fa.*

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Feb'y 15, '93, and on the same day I made demand upon the Board of School Directors of the Parish of Orleans by serving written notice on Mr. E. B. Kruttschnitt, president of said board, in person, in the parish
114 of Orleans, La., who informed me that he had no funds in his hands with which to pay this writ.

I then notified counsel for plaintiff herein of my actions in the premises and was directed by him to return this writ *nulla bona.*

J. B. DONNALLY,
U. S. Marshal.
By T. J. GALBRETH, *D'y.*

Fi. Fa. Issued July 12, 1894.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Circuit, Holding Sessions in and for the Eastern District of Louisiana.

The President of the United States to the marshal of the eastern district of Louisiana or his lawful deputy, Greeting:

You are hereby commanded to demand from the Board of Directors of the City Schools of New Orleans the sum of eight thousand and ninety-seven 17/100 dollars with 5% interest per annum from May 22, 1890, payable out of the school tax levied by the city of New Orleans prior to 1879 and clerk's costs, $26.00, attorney's docket fee, $20.00, marshal's costs, cash, which Mrs. M. M. Fisher and her husband, M. M. Fisher, lately recovered by judgment of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said

Board of Directors of the City of New Orleans in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said Board of Directors of the City Schools of New Orleans in your district, and that you have those moneys before our said court to render to the said Mrs. M. M. Fisher and her husband, M. M. Fisher, for the judgment aforesaid, on the 70 day from the date hereof, together with this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 12th day of July,
115 A. D. 1894, and 119 year of the Independence of the United States.

[SEAL.] E. R. HUNT, *Clerk.*

(Indorsed:) No. 12060. U. S. circuit court, eastern district of Louisiana. Mrs. M. M. Fisher, *fi. fa., vs.* The Board of School Directors.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., July 12, '94, and on the same day I served notice on Chas. H. Schenck, city treasurer and *ex officio* treasurer of school board for the parish of Orleans, ordering and requiring him to pay into my hands all moneys held by him as treasurer aforesaid, and which had been collected by the city for school purposes prior to the year 1879.

In pursuance of said notice and order to pay the said Charles H. Schenck, in his official capacity as hereinbefore stated, did on July 28th, 1894, pay into my hands the following amounts, viz:

Am't of school tax collected for the year 1874.....	120.12
Am't of school tax collected for the year 1875.....	429.21
Am't of school tax collected for the year 1876.....	372.57
Am't of school tax collected for the year 1877.....	582.68
Am't of school tax collected for the year 1878.....	388.51
	$1,893.09

Which I paid to Charles Louque, attorney for plaintiff, to be credited in the judgment in this case, after deducting the costs for executing this writ.

There being no further collections to be made hereon, by instructions of pl'ff's attorney I return this writ in accordance with the above facts.

Aug. 12, '94.

J. V. GUILLOTTE,
U. S. Marshal,
By T. J. GALBRETH, *D'y.*

Notice of Seizure.

July 12, 1894.

Office of the United States marshal, eastern district of Louisiana.

NEW ORLEANS, LA., *July 12th*, 1894.

MRS. M. M. FISHER
vs.
THE BOARD OF DIRECTORS OF THE PUBLIC SCHOOLS of the City of New Orleans. } No. 12060.

116 In the U. S. Circuit Court of the Eastern District of Louisiana.

To Charles H. Schenck, city treasurer of the city of New Orleans and *ex officio* treasurer of the Board of School Directors of the City of New Orleans:

Please take notice that by virtue of a writ of *fieri facias* issued in the above-mentioned suit by the hon. court aforesaid and to me directed I seize in your hands a sufficient amount of the funds of the taxes collected by the city of New Orleans, Louisiana, for school purposes and levied for the period prior to the year 1879 to pay and satisfy the judgment herein rendered, amounting to the sum of eight thousand and ninety-seven dollars and seventeen cents with 5 % per annum interest thereon from the 22nd day of May, 1890, and all costs, which you may now have or hereafter have in your possession or under your control for said period, and which you will hand over to me.

J. V. GUILLOTTE,
U. S. Marshal,
By ALCEE LE BLANC,
Deputy U. S. Marshal.

Citation in Garnishment.

Issued July 12, 1894.

UNITED STATES OF AMERICA,
Eastern District of Louisiana.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

MRS. M. M. FISHER
vs.
BOARD OF SCHOOL DIRECTORS OF THE CITY OF N. O. } No. 12060.

The President of the United States of America to Chas. H. Schenck, city treasurer of the city of New Orleans and *ex officio* treasurer of the Board of School Directors of the City of N. O., garnishee:

You are hereby cited to declare on oath, what property or effects belonging to defendant in this case you have in your possession or

under your control, or in what sum you are indebted to said defendant, and also, to answer in writing under oath, the interrogatories annexed to the supplemental petition of which a copy accompanies this citation, and deliver your answer to the same in the office of the clerk of the circuit court of the United States, for
117 the fifth circuit and eastern district of Louisiana, in the city of New Orleans, within ten days after the service hereof, otherwise judgment will be entered against you for the amount claimed by the plaintiff, with interest and costs.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 12 day of July A. D. one thousand eight hundred and ninety-four and of the Independence of the United States of America the 119 year.

Teste:

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Received by U. S. marshal, New Orleans, La., July 12, 1894, and on the 13th day of July of the same year, I served a copy hereof, with accompanying supplemental petition, and notice of seizure on Charles H. Schenck, city treasurer of the city of New Orleans, and *ex officio* treasurer of the Board of School Directors of the City of New Orleans by handing the same to him in person, in the city of New Orleans, State of Louisiana.

(Signed) J. V. GUILLOTTE.
U. S. Marshal,
By JOS. FABACHER, JR., *Dep'ty.*

Supplemental Petition in Garnishment.

Filed July 12, 1894.

MRS. M. M. FISHER
vs.
BOARD OF SCHOOL DIRECTORS OF THE CITY OF NEW ORLEANS. } No. 12060.

To the honorable the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The supplemental petition of Mrs. M. M. Fisher respectfully showeth:

That upon the judgment obtained in this case for the sum of eight thousand and ninety-seven 17/100 dollars with 5% interest from 22nd, 1890 and costs, petitioner has issued a writ of *fi. fa.*; and having reason to believe that Chs. H. Schenck, city
118 treasurer and *ex officio* treasurer of the School Board of the School Directors of the City of New Orleans a third person is indebted unto the said defendant in execution, or has property or effects in possession, or under control, belonging to the said debtor,

or indebted to said debtor petitioner has caused the seizure to be made in the hands of said third persons.

Therefore, petitioner prays that said Chs. H. Schenck, city treasurer of the city of New Orleans and *ex officio* treasurer of the Board of School Directors for the City of New Orleans be cited, and ordered to answer, under oath, the annexed interrogatories, and after due proceedings, condemned to pay the amount of said judgment and costs.

CHS. LOUQUE, *Attorney.*

Interrogatories.

1st interrogatory. Had you in your hands, or under your control, directly, or indirectly, at the time of the service of notice of seizure in this case, or since, or at the time of service of these interrogatories, or at any time since, or at the time of answering these interrogatories, any money, rights, credits, or other property whatsoever, directly or indirectly, belonging or due to the said defendant in execution, or in which the defendants have or had any direct or indirect interest for the whole or for a part or otherwise, and if yea, what is the nature, description and amount thereof; and is the same not sufficient to pay or satisfy the full amount of said judgment and costs; or if less, to what amount?—you being asked and required to make a full disclosure in relation to the same.

2d interrogatory. Were you not at the time of service of notice of seizure upon you in this case, or since then, or at the time of service of these interrogatories, or since, or at the time of answering the same, directly or indirectly indebted or obligated unto the said defendant in execution for anything or for any sum whatever, whether for yourself alone or altogether with others, in consequence of any sale, or exchange, or transfer, or assignment, or payment, or novation or compensation, or letting, or hiring, or service, or labor, or employment, or affreightment, or insurance, or job, or work, or rent, or interest, or partnership, or loan, or deposit, or trust, or bailment, or agency, or suretyship, or compromise, or pledge, or in consequence of any contract or obligation whatever, whether the same be due or to become, and whether the interest of said defendant in execution be direct or indirect, or be for the whole or a part only, or whether it be by bill, note or otherwise; and if yea, what is the nature, description and amount thereof, and is the same not
119 sufficient to pay or satisfy the full amount of said judgment and cost; or if less, what amount?—you being asked and required to make a full and detailed disclosure in relation to the same.

3d interrogatory. Have you at any time since the service of notice of seizure in your hands herein, made, directly or indirectly, unto or with the said defendant in execution, any payment, or novation, or compromise, or arrangement, or given them any note or other written obligation, or received from them directly or indirectly, any receipts or acquittance, or received or acquired against them directly or indirectly, any compensation, or set-off, or de-

mand, or note, or other obligation or right of action?—and if yea, state the nature, description and amount thereof, and the time, place and circumstances of the same.

4th interrogatory. Have you not in your hands certain sums of money collected from the school tax levied by the city of New Orleans for the years 1873, '4, '5, '6, '7, and '8 and out of which the judgment herein is specially made payable?

(Signed) CHS. LOUQUE, *Attorney.*

Let the within supplemental petition be filed, and let C. H. Schenck, city treasurer and *ex officio* treasurer of the School Board of School Directors of the City of New Orleans be made garnishee herein, and cited to answer the accompanying interrogatories under oath in writing and as the law directs as herein prayed for.

New Orleans, July 12, 1894.

(Signed) CHARLES PARLANGE, *Judge.*

Fi. Fa. Issued Dec. 23, 1895.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Fifth Circuit, Holding Sessions in and for the Eastern District of Louisiana.

The President of the United States to the marshal of the eastern district of Louisiana or his lawful deputy, Greeting:

You are hereby commanded to demand from the Board of
120 Directors of the City Schools of New Orleans the sum of eight thousand and ninety-seven 17/100 dollars, with 5% interest per annum from May 22, 1890. Payable out of the school tax levied by the city of New Orleans prior to 1879 and—

Clerk's costs	$26.00
Attorney's docket fee	20.00
Marshal's costs	
Clerk's costs on this writ	1.10

cash which Mrs. M. M. Fisher and her husband, M. M. Fisher, lately recovered by judgment of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said Board of Directors of the City Schools of New Orleans in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said Board of Directors of the City Schools of New Orleans, in your district, and that you have those moneys before our said court to render to the said Mrs. M. M. Fisher and her husband, M. M. Fisher, for the judgment aforesaid, on the 70th day from the date hereof, together with this writ.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, this 23rd day of December, A. D. 1895, and 120th year of the Independence of the United States.

[SEAL.] (Signed) E. R. HUNT, *Clerk.*

(Indorsement:) No. 12060. U. S. circuit court, eastern district of Louisiana. Mrs. M. M. Fisher and husband *vs.* Board of Directors of the City Schools N. O. *Fi. fa.* Marshal's return.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Dec. 23, '95, and on the same day I made demand upon C. H. Schenck, treasurer of the city of New Orleans, and received from him in current money of the United States the sum of three hundred and twelve dollars and fifty-six cents ($312.56), which I paid Mr. Charles Loque, plaintiff's attorney, less the costs of collection, and took his receipt for same.

The time for the return of this writ expiring on this day I return same.

J. V. GUILLOTTE,
U. S. Marshal,
By T. J. GALBRETH, *Deputy.*

121 *Bill of Exceptions.*

Filed March 26th, 1892.

MRS. M. M. FISHER, Authorized, &c., *vs.* BOARD OF SCHOOL DIRECTORS. } No. 12060.

Be it remembered, that on the trial in this case, of the exception to the jurisdiction of the court,

Counsel for defendant, The Board of School Directors, said board being a citizen of the State of Louisiana, offered to prove by witnesses, who were duly called and sworn, that the school certificates on which the judgment of the civil district court for the parish of Orleans herein proceeded upon, is based, were transferred and assigned to plaintiff for the mere purpose of suing, by persons who are likewise citizens of the State of Louisiana, and that said certificates are by plaintiff held in trust for said citizens of the State of Louisiana, who could not themselves, in their said character, have sued defendant in this court.

But on objection to the introduction of any testimony upon that issue made and raised by counsel for plaintiff that said certificates were merged in said judgment of the civil district court for the parish of Orleans, the court considering that the choses in action were merged in the judgment and that the suit was not to recover the contents of a promissory note or other chose in action but upon the judgment and that the judgment was conclusive upon the parties as to the ownership of the certificates upon which it was based, sustained the objection and excluded the testimony.

Wherefore counsel for defendant then and there took this bill of exceptions to the ruling of the court, excluding said testimony to prove the assignment and transfer unto plaintiff of said school certificates, in trust, and in order to sue, and now tenders said bill which is duly signed and sealed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

March 26th, 1892.

Answer of Garnishee.

Filed July 26th, 1894.

MRS. M. M. FISHER
vs.
BOARD OF DIRECTORS OF THE CITY SCHOOLS OF NEW ORLEANS. } No. 12060.

122 And now comes into court Charles H. Schenck, treasurer of the city of New Orleans and *ex officio* treasurer of the board of school directors of the said city, who in answer to the interrogatories served on him in the above entitled and numbered cause, under oath, answers as follows, to wit:

In answer to interrogatory No. 1. Yes, to the following amounts:

For the year 1874	$120.12
For the year 1875	429.21
For the year 1876	372.57
For the year 1877	582.68
For the year 1878	388.51
Making a total of	$1,893.09

In answer to interrogatory No. 2. Answered by the answer contained in the first interrogatory.

To the third interrogatory. No.

To the fourth interrogatory. Answered by interrogatory No. 1.

(Signed) CHAS. H. SCHENCK, *Treasurer.*

Sworn to and subscribed before me this 25th day of July, 1894.

(Signed) C. H. SHIELDS, *Not. Pub.*

Motion to Annul Judgment and Dismiss Suit.

Filed Dec. 11, 1897.

MRS. M. M. FISHER
vs.
THE BOARD OF SCHOOL DIRECTORS OF THE CITY OF NEW ORLEANS. } No. 12060.

On motion of Sam'l L. Gilmore and James J. McLoughlin, solicitors for The Board of School Directors of the City of New Orleans, defendants herein, and on suggestion that the bill herein

filed, together with the record and judgment of the civil district court, and of the judgment of the supreme court of the State of Louisiana, which are made part of said bill, disclose that the holders of all school warrants and certificates for which the school board is sought to be made liable in this case are each and all citizens of the State of Louisiana, many of them being, including the complainant herself, assignees of citizens of Louisiana, having acquired said warrants and certificates from citizens of Louisiana; that the complainant herself holds but an inconsiderable amount of said warrants and certificates compared with the total amount of those on which recovery is sought, that the suit is therefore substantially a controversy between citizens of the State of Louisiana and the school board of the city of New Orleans, also a citizen of the same State, and the controversy is also based on choses in action sued on by assignees themselves citizens of the State of Louisiana, and with no claim or averment that their assigns could have sued in this court; that hence it is manifest, the suit in the complainant's name is really by and for the benefit of parties incapable of suing in this court and the controversy is in all its aspects of a character not within the jurisdiction of this court; that the judgment and decree of this court hereinbefore rendered are absolutely null and void, and of no effect, because of the want of jurisdiction in this court to render said judgment—therefore the defendant now presents to the court this motion, that the judgment hereinbefore rendered in favor of complainant be declared null and void and that said judgment and decree be set aside and revoked, for all necessary orders in the premises and for general relief.

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Motion Presented in Open Court Dec. 20, 1897, *and Leave to File Refused.*

MRS. M. M. FISHER
vs.
THE BOARD OF SCHOOL DIRECTORS OF THE CITY OF NEW ORLEANS. } No. 12060.

In Equity.

On motion of Sam'l L. Gilmore and James J. McLoughlin, solicitors for defendants herein, and on suggesting to the court that since the filing of exceptions to the master's report herein defendants have discovered that the plaintiff herein is not a citizen of Spain, but, on the contrary, is a citizen of Louisiana, and on suggestion to the court that the said fact has only been discovered after diligent search by defendants, and on suggesting that because of said facts this court is without jurisdiction to try this cause and defendants desire to file the annexed plea to the jurisdiction of this court, and in order to do so desire the court to permit them to withdraw or treat as withdrawn the demurrer and answers hereinbefore filed by defendants, and on suggesting that due notice of the intention of defendants to make this application has

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been given plaintiff and interveners herein, and on suggesting that equit- and justice require that this permission be granted,

It is ordered that plaintiff and interveners show cause herein on Monday, December 20th, 1897, at 11 a. m., why the annexed plea to the jurisdiction should not be filed herein.

Notice acknowledged and service accepted.

(Signed) CHAS. LOUQUE.
(Signed) CHAS. J. THEARD,
Solicitor for E. F. Duclaux, Intervener.

All objections reserved.
Notice waived.

(Signed) E. HOWARD McCALEB,
Solicitor for Mrs. Gage and U. Koen, Int'rs.

Decree.

Decree filed February 21, 1898.

Circuit Court of the United States for the Eastern District of Louisiana.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

And this cause coming on, after full hearing of the parties and upon the bill, answer and master's report duly approved by the court and upon consideration thereof;

It is ordered, adjudged and decreed that the city of New Orleans trustee of the special school taxes levied and collected for the years 1871 to 1878 inclusive be condemned to pay pl'ff and interveners the said taxes, received and collected by her, as follows: Seventy-one thousand nine hundred and thirty-eight 78/100 dollars with five per cent. interest per annum on $71,139.60/100* from January 24th, 1881,* and on $799.18/100 from May 11th, 1896, until paid. And it is further ordered that this bill be retained for a further accounting and such orders and decrees as may be necessary.

*This decree was amended by order of court, dated April 28th, 1898, so as to only allow interest on the amount recovered,
125 to wit: $71,139.60, from February 21, 1898, the date of said decree, instead of from Jan'y 24, 1881.

It is further ordered that after deducting and paying to the solicitor herein by preference and privilege such sum as may be allowed him hereafter, that the balance be distributed and paid *pro rata*, and up to their full claims to the following-named persons, to wit:

Mrs. M. M. Fisher, $11,094.87/100 with legal interest on $8,097.17/100 from May 22nd, 1897, with a credit of $1,893.09 paid on the August, 1894.

To the same $8,802.39/100, with legal interest on $7,401.69/100 from May 22nd, 1897.

And the further sum of $5,864.64/" with legal interest on $5.140.31/100 from May 22, 1897.

F. J. Gasquet the sum of $57,059.69/100 with legal interest on $44,978.74/100 from May 22nd, 1897.

Joseph Venta the sum of $21,297.72/100 with legal interest on $17,006.27/100 from May 22nd, 1897.

Mary Quinlan the sum of $5,373.78/100 and fifteen dollars ($15.00/100) costs with 5% interest from December 2nd, 1897.

Jean Pomes the sum of $6,315.73/100 with fifty dollars (50.00/100) costs and legal interest from March 20th, 1897.

Georgiana T. Young, Lizzie G. Wheelright, Mary A. Sullivan and Mary O'Donnell, $653.12/100 with ten dollars (10.00/100) costs.

Mrs. Mary Fortier the sum of $32.19/100 and five dollars costs ($5.00/100).

Mrs. A. B. Gage the sum of five hundred and fifteen 44/100 dollars with 5% int. from Nov. 30th, 1887 and $12.00 costs.

Widow E. F. Duclax the sum of two thousand and ninety 17/100 dollars and $81.00 costs.

U. Koen the sum of twenty-two thousand nine hundred and ninety-one 07/100 dollars and $27.10/100 costs; and that the city of New Orleans pay all costs of this suit.

Judgment rendered and signed February 21st, 1898.

New Orleans, La., February 21st, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Petition of Chas. Louque for Solicitor's Fee.

Entered and filed February 21, 1898.

To the hon. the circuit court of the United States for the eastern district of Louisiana:

126 The petition of Charles Louque *pro interesse suo*, a citizen of Louisiana, respectfully represents:

That your petitioner is one of the regular solicitors of this hon. court;

That in his said capacity he has prepared the bill for Mrs. M. M. Fisher and such parties who should choose to come in said cause and share in the expense thereof against the City of New Orleans for an account of the school taxes for 1871 to 1878 levied and collected by said city.

That your petitioner has by diligent enquiry and by his ability succeeded in obtaining an account of said funds and has brought into court the sum of seventy-one thousand nine hundred and thirty-eight 78/100 dollars, with int. and costs.

That under chancery laws and the equity of this hon. court your petitioner is entitled to be paid a reasonable fee out of the funds so realized, with such lien as is accorded to a solicitor.

Your petitioner avers that as a general rule (10%) ten per cent. is allowed to solicitors in such cases;

That this matter should be referred to a master to examine and report to the court.

Wherefore he prays that the matter of this petition be referred — one of the masters of this hon. court to report upon the fee to which your petitioner as solicitor is entitled herein and he prays that said amount so reported be paid to him with such lien and privilege as is granted by law to solicitors and by preference out of the funds realized and brought into court; and petitioner prays for general relief, &c.

(Signed) CHS. LOUQUE, *Pa. Pa.*

Order of Reference on Petition.

Let, as within prayed for, the petition *pro interesse suo*, of Charles Louque, solicitor, be filed and let the same be referred to E. D. Saunders, Esq., master of this court.

N. O., February 21st, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Further Order to Master on Petition of Charles Louque, Solicitor.

In the matter of the petition *pro interesse suo* of Mr. Charles Louque in the cause of Mrs. M. M. Fisher *vs.* City of New Orleans, No. 12516 of the U. S. circuit court for the eastern district of Louisiana, which petition was referred to Eugene D. Saun-
127 ders, Esq., master, on February 21st, 1898. Let said master specially report to the court not only with regard to the value of Mr. Louque's services as solicitor in the cause, but also as to whether, in the present condition of said cause, the court can deal with the question of solicitor's fees in excess of the statutory fees.

New Orleans, La., March 3d, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Petition to be Made Party Complainant.

Filed March 2, 1898.

To the hon. the circuit court of the United States for the eastern district of Louisiana:

The petition of John Blackadder who resides in New Orleans, a citizen of the State of Louisiana, respectfully represents:

That Mary Blackadder, the wife of John Fisher, departed this life in this city on the 26th day of February, 1898, intestate.

That four children were born, the issue of her marriage with John Fisher, all of whom are minors and residing in this city with your petitioner, who is their maternal grandfather, to wit: John Blackadder Fisher now aged sixteen years; James M. Fisher aged

fourteen; William Gardner Fisher aged nine years, Robert Blackadder Fisher, aged seven years.

That John Fisher their father is now absent from this city and is in the island of Cuba.

That during his absence and until such time as he may return and be confirmed by the probate court as the natural tutor of his minor children, your petitioner desires to represent his said grandchildren in the prosecution of the suit of Mrs. M. M. Fisher and her husband against the City of New Orleans wherein a decree has been rendered in their favor on an accounting, under No. 12516 of the docket of this court.

Wherefore petitioner prays that he be appointed by this hon. court as *prochein ami* to the aforenamed minors Fisher, with power to represent them and prosecute the suit of Mrs. M. M. Fisher, No. 12516 of the docket of this court until such time as the father of said minors, John Fisher, may return to the city of New Orleans and qualify and be confirmed as their natural tutor, and petitioner prays for general relief, &c.

(Signed) CHS. LOUQUE, *Solicitor.*

Order.

Let the petition of John Blackadder be filed herein and
128 let him be appointed as the *prochein ami* of the minors John B. Fisher, James M. Fisher, William G. Fisher and Robert B. Fisher, with power to prosecute the suit of Mrs. M. M. Fisher and husband against the City of New Orleans, No. 12516 of the docket of this hon. court until such time as John Fisher, the father of said minors, may return to this city and be confirmed and qualified as their natural tutor and shall make himself a party to the said suit.

New Orleans, March 2d, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Motion for Revival and Delay for Rehearing.

Entered and filed March 5, 1898.

United States Circuit Court for the Eastern District of La.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

On motion of James J. McLoughlin, assistant city attorney, solicitor for defendant City of New Orleans, and on suggesting to the court, that since the rendition and signing of the decree herein on February 21st, 1898, the complainant herein, Mrs. M. M. Fisher, has died, the said death having occurred on Friday, February 25th, 1898, as will appear by reference to the death certificate, hereto annexed and made part hereof.

And on further suggestion to the court, that this suit abated the death of the complainant aforesaid, and defendant desire make an application for a rehearing on the decree; but that u proper parties can be made to represent the deceased complain it is impossible to do so.

It is ordered, that the bill and suit thus abated, be revived, acc ing to due process of equity, by making the legal representative the deceased, parties, and that defendant be notified thereof, reserving to the defendant the right, after such revival, ten d within which to make an application for a rehearing upon the cree rendered and signed herein on February 21st, 1898, and t meanwhile all further proceedings herein be stayed.

Order.

The within motion considered, let same be filed, and
129 notice of the same be given Charles Louque who was solicitor for complainant.

In the meantime, the court taking notice of the intention of fendant to apply for a rehearing, let further proceedings herei stayed until the further order of the court.

New Orleans, March 5th, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judg

Certificate of Board of Health as to Death of Mary Fisher, Annexe Foregoing Motion and Order.

UNITED STATES OF AMERICA, }
State of Louisiana, Parish of Orleans. }

Office of the board of health, recorder of births, marriages, deaths.

Be it remembered, that on this day, to wit: the twenty-fift February in the year of our Lord one thousand eight hundred ninety-eight, and the 122 of the Independence of the United St of America, before me Edmund Souchon, M. D. president boar health & *ex officio* recorder of births, marriages and deaths, in for the city of New Orleans, and parish of Orleans, personally peared:

A. J. Leitz, an undertaker, a native of this city, residing at 2409 Tchoupitoulas street, who hereby declares that

Mary Fisher, born Blackadder, (white) a native of Virginia, a 43 years, departed this life, this day (25 February 1898) at No. 2 Chippewa street, in this city.

Cause of death, "Bright's disease."

Certificate of Dr. R. A. Bayley.

Deceased was married to John Fisher & 38 years in city.

Thus done at New Orleans in the presence of the aforesaid A Leitz as also in that of Messrs. P. H. Lanauze & L. B. Gehlbach

this city, witness by me requested so to be, who have hereunto set their hands, together with me, after the reading hereof, the day, month and year first above written.

(Signed) A. J. LEITZ.
P. H. LANAUZE.
L. B. GEHLBACH.
EDMOND SOUCHON, M. D.,
President Board of Health & ex Officio Recorder.

I do certify, the foregoing to be a true and faithful copy from the original recorded in book marked No. 115, folio 1025.

In testimony whereof, I have set my hand and affixed the seal of my office, at the city of New Orleans, this second day of March in the year one thousand eight hundred and ninety-eight
130 and the one hundred and twenty-two of the Independence of the United States of America.

[SEAL.] (Signed) P. HENRY LANAUZE,
Deputy Recorder of Births, Marriages, and Deaths, Parish of Orleans.

Rule to Rescind Order.

Entered and filed March 5, 1898.

Circuit Court of the U. S. for the East'n D't of La.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

On motion of Chs. Louque, solicitor for John Blackadder *prochein ami* of the minors Fisher and on suggestion to the court that said minors have been made parties hereto and that the order staying all proceedings herein without further restriction should be set aside;

It is ordered by the court that the City of New Orleans do show cause on Saturday the 12th of March, 1898, why said order should not be rescinded.

Marshal's Return on Rule to Rescind. Filed March 8, 1898.

Received by U. S. marshal, New Orleans, La., March 7th, '98, and on the same day I served a true copy of the within rule on the City of New Orleans through Walter C. Flower, mayor thereof by handing the same to him in person in the city of New Orleans, La.

(Signed) J. V. GUILLOTTE,
U. S. Marshal,
By JOHN EARLY.

Hearing and Submission of Rule to Rescind.

Extract from the Minutes.

November Term, 1898.

NEW ORLEANS, SATURDAY, *March* 12, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

131 MRS. M. M. FISHER *vs.* CITY OF NEW ORLEANS. } No. 12516.

This cause came on to be heard upon the rule filed by the complainant to rescind the order herein staying proceedings, and was argued by Chas. Louque, sol'r for complainant, E. H. McCaleb for interveners, and J. J. McLoughlin, ass't city attorney for City of New Orleans; whereupon after hearing the parties the court took the matter under consideration.

Remittitur of Mary Quinlan.

Filed March 12, 1898.

Circuit Court of the U. S. for the Eastern D't of La.

MRS. M. M. FISHER *vs.* CITY OF NEW ORLEANS. } No. 12516.

Into court comes Mary Quinlan who now files a remittitur, so far as the interest is concerned which has been allowed to her in the decree herein rendered.

It is therefore ordered that the remittitur now filed be entered and that the interest allowed in the decree herein rendered be and the same is hereby remitted.

Motion and Order to Make Party.

Filed and entered April 22, 1898.

Circuit Court of the United States for the Eastern District of Louisiana.

MRS. M. M. FISHER *vs.* CITY OF NEW ORLEANS. } No. —.

On motion of Chs. Louque, attorney for John Fisher, and on suggesting to the court that he has been appointed and has this day qualified as natural tutor of his minor children, John Black-
132 adder Fisher, James Miller Fisher, William Gardner Fisher and Robert Blackadder Fisher;

It is ordered by the court that John Fisher a natural tutor of his minor children be made a party complainant to these proceedings.

Letters of Tutorship.

Filed April 22, 1898.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, Division E.

Letters of tutorship.

Succession of Mrs. M. M. FISHER. No. 56305.

This is to certify, to all whom it may concern, that on the 14th day of April in the year of our Lord one thousand eight hundred and ninety-eight an application was made to the Honorable Geo. H. Theard, the judge of the civil district court for the parish of Orleans, division E, by John Fisher, praying that he might be admitted to take his oath as natural tutor of his minor children, John B. Fisher, Jas. M. Fisher, W. G. Fisher and Rob't B. Fisher.

Now know ye, that the said John Fisher has been confirmed as natural tutor of his aforesaid minor children and has on the 22d day of April, 1898, taken his said oath as such, and has complied with all the other requisites of the law.

Witness our hands and the seal of the civil district court, this 22d day of April in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL.] (Signed) GEO. H. THEARD, *Judge.*
(Signed) F. E. PETERSON, *D'y Clerk.*

A true copy.
(Signed) F. E. PETERSON, *D'y Clerk.*

133 *Order Staying Further Proceedings.*

Signed March 5, 1898; rescinded ——.

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, FRIDAY, *April* 22, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

MRS. M. M. FISHER ET ALS. *vs.* CITY OF NEW ORLEANS. } No. 12516.

The rule of complainant to rescind, filed herein on March 5, 1898, having been considered, it is ordered that the order staying further proceedings herein signed March 5, 1898, be and is hereby rescinded.

Petition of Defendants for a Rehearing.

Filed April 23, 1898.

U. S. Circuit Court for the Eastern District of Louisiana.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } In Equity. No. 12516.

To the honorable the judge of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The petitioner of The City of New Orleans herein represented by Walter C. Flower, mayor, defendant herein, and of The Board of School Directors for the Parish of Orleans, herein represented by Ernest B. Kruttschnitt, its president, also defendant herein, respectfully shows that defendants believe that there is error to their prejudice in the decree of this honorable court herein, and they desire to, and do hereby, apply to and petition this honorable — to grant them a rehearing herein for the purpose of correcting the errors, mistakes and inadvertence in said decree; and defendants say that said decree is erroneous and to their prejudice, because:

1st.

The evidence does not warrant the decree allowing 5 % in-
134 terest on seventy-one thousand one hundred and thirty-nine 60/100 dollars ($71,139.60) from January 24th, 1881, because the master's report does not allow such interest, but expressly states that the said amount is now due, and the master's report was filed May 22nd, 1897. Hence it was error to allow interest from 1881; if due at all it is only due from the time the master says it is now due, and the master's report having found as follows, under date of May 22nd, 1897, "In my opinion, the amount the city now owes the school board for taxes collected, and other interest on the taxes collected is as above stated, $71,938.28," it is error to allow interest on this amount for a period of nearly seventeen years prior to the date of the master's report.

2nd.

It was error to allow interest at 5 % from December 2nd, 1897, on judgment in favor of Mary Quinlan, for the sum of five thousand, three hundred and seventy-three 78/100 dollars, because it will appear from the certified copy of her judgment, offered in evidence by complainant, that Mrs. Mary Quinlan's judgment bears no interest.

3rd.

It was error to allow the following costs for the reason that there is no evidence whatever in the record to show the amount which should be allowed for such costs, to wit:

Mrs. A. B. Gage $15.44
E. F. Duclaux 81.00
U. Koen 27.10

4th.

It was error for the court to decree judgment against the city for any part of the taxes of 1871, for the reason that the evidence shows that no part of complainant's claims arose during the year 1871, and further, that the act of the legislature which directed the city to impose a special tax of 1/4 % was passed in the year 1873; therefore could not affect the taxes of 1871.

Furthermore, it is error for the court to allow this decree against the city for taxes for 1871, for the reason that the complainant does not claim any share in the taxes of 1871, or any interest thereon either in her original or supplemental bill, and it was error for the court to allow her more than she claimed. Consequently the amount declared due out of taxes for 1871, to wit: seven thousand eight hundred and twenty-one 17/100 dollars, and the delinquent interest of taxes of 1871, nine thousand, three hundred
135 and thirty-two 81/100 dollars, were allowed in error, and should be deducted.

5th.

This being a suit for an accounting, the court erred in giving judgment against the city for money that she never collected, in that the judgment includes the sum of eleven thousand nine hundred and thirty-three 27/100 dollars, which the master's report states is a discount allowed by the city to the tax-payer for prepayment of school taxes, and as the bill only claims and asks that the city be compelled to pay over the actual amount of cash collected, and as this money was never collected, we submit that it was error for the court to order it paid over. This being only a suit for an accounting, judgment cannot be had in the bill for anything but actual money collected, and this money was never collected.

6th.

The evidence shows that the full amount of money collected for 1874 school taxes was turned over to the school board (see testimony of Clark Steen, and his report, offered in evidence by complainant), and such being the case it is urged that it was error for the court to make the city pay over any more money out of the taxes of 1874, the city having already paid over all that she owes on that year. Such being the case, the amount of $10,816.59 and $209.50, proportion of interest on school taxes for 1873, and the proper proportion of principal for school taxes for 1874 (to ascertain the amount of which a re-reference to the master is necessary) are not due to the school board. While it is true that all back taxes prior to 1879 are lumped into one fund, we urge that in calling for an accounting it is sufficient for the city to show, in order to be discharged as far as the taxes of any particular year are concerned, that she has paid over the full amount of taxes due the school board for that year

and having done this, with the taxes for 1874, it is error for the court to order her to turn over any more of the taxes for that year.

7th.

Complainant's judgment, No. 12060, and her other judgments are law judgments, and she has ample remedy in law; hence no right to invoke the equity side of the court.

8th.

Complainant had no right to sue the city of New Orleans because her judgments are against the school board only, and she
136 does not allege that the city owes the school board anything.

9th.

The evidence shows that in suit No. 12060 the city was garnished on July 12th, 1894, under a *fi. fa.*, and answered under oath that she had one thousand eight hundred and ninety-three 9/100 dollars to the credit of the school fund prior to 1879 on that date, and having paid that amount over to Mrs. Fisher under her judgment, it was error for the court not to hold that said payment to and acceptance by Mrs. Fisher, complainant herein, estopped her from traversing said garnishment, as she is doing by this proceeding, and the court should have held such payment and acceptance as an estoppel and *res adjudicata* concerning all collections made up to July 12th, 1894.

10th.

The court erred in approving the finding of the master that the interest or penalty on delinquent taxes formed a part of the taxes and should be turned over to the board. But even though this was correct (which — course is not admitted) we hold that the court erred in ordering the city to pay over the penalty on the taxes which she had already paid over. In any event she should not be compelled to pay over the penalty on any taxes, except on those taxes which are still in her possession. In other words the master's report shows twenty-three thousand, one hundred and eight 3/100 dollars of principal, and we submit that only the penalties on this twenty-three thousand one hundred and eight 3/100 dollars should be turned over, and not the penalties on the taxes that were turned over to the board years ago.

11th.

It was error for the court to have stricken from the records the two documents filed June 29th and July 1st, 1897, for the reason that they remained on the files from June to December without any objection on the part of the complainant and it was too late then for her to make the objection she did on December 20th, 1897. The most that should have been required of defendants was to amend the plea to the jurisdiction by affixing the solicitor's certificate.

12th.

It was error for the court to refuse to allow defendants to file affidavit and plea to the jurisdiction, *ratione personæ*, December 20th, 1897, for the reason that, under the law, such a plea can be filed at any time; furthermore as the city's plea and affidavit set up a charge of fraud against the complainant, in equity, such
137 charge having been made, supported by affidavit, it was the duty of the court to entertain the plea, to let the fraud be proven.

13th.

It was error for the court not to have allowed the plea of prescription made in the answers of defendants, for as the complainant's cause of action arose in 1873 and subsequent years, the last year being 1879, the same was prescribed by the prescription of ten years, and consequently her suit should have been dismissed on the consideration of this plea.

14th.

Her judgment, No. 12060, is based upon choses in action, and not sueable in this court, and there is no allegation that the original assignors could sue in this court; therefore the court has no jurisdiction *ratione materiæ*.

15th.

The court erred in holding that the school taxes out of which said judgments have been made payable is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public schools of said city.

16th.

The court erred in holding that there was any privity between the city of New Orleans and Mrs. Fisher, and in holding that she has any right to claim an accounting from the city of New Orleans. Defendant city avers and declares that the only person who could call for such accounting is the said school board, the codefendant herein, and the court erred in permitting any other person than the said school board to call for such accounting.

17th.

It was error to order the whole fund ascertained by the master to be paid over to complainant and interveners in this suit, because if said fund is a trust fund, it is held for the benefit of all interested in said fund, and the only part that should be paid to complainant and interveners is their proportion of same; in other words, it was error for the court to ignore the claims of other certificate-holders not party to this suit, and who were not notified by publication, nor cited herein. And to ascertain what proportion of the fund should go to complainant and interveners herein, a rereference to the master is necessary. And petitioners show that all the facts aforesaid are apparent in the record.

Wherefore petitioners, defendants, pray that this petition for a rehearing be filed and considered, and that notice thereof be given to all parties in interest. And that after due consideration
138 and hearing that this petition be granted, and rehearing had, and that the decree hereinbefore rendered be modified, or set aside, so as to grant to petitioners the relief prayed for.

And petitioners pray for such orders, rulings, process and decrees herein as may do justice and equity to and between all parties herein involved.

And petitioners pray for all special, equitable and general relief.

(Signed) JAMES J. McLOUGHLIN,
Assistant City Attorney, Solicitor for Defendants.

Order Fixing Petition for Rehearing for April 26, 1898.

Extract from the Minutes, November Term, 1897.

NEW ORLEANS, SATURDAY, *April* 23, 1898.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, district judge.

MRS. M. M. FISHER ET ALS.
vs.
THE CITY OF NEW ORLEANS. } No. 12516.

This day came J. J. McLoughlin, ass't city attorney of counsel for the defendant herein, and presented a petition for a rehearing herein, which was ordered filed and fixed for hearing on Tuesday, April 26, 1898, at 11 a. m., E. H. McCaleb, of counsel for complainant and interveners, being present and taking notice.

Plea in Abatement.

Filed April 23, 1898.

U. S. Circuit Court, East. Dist. of La.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

In the Honorable the Circuit Court of the United States for the Eastern District of Louisiana.

139 The defendant, The City of New Orleans, by protestation not confessing or acknowledging any or part of the matters or things in the said bill of complaint mentioned to be true, in such manner or form as the same are set forth and alleged, does plead thereto, and for plea says:

That the record herein shows that the plaintiffs, Mrs. M. M. Fisher, (now deceased) and her husband, M. M. Fisher, are both subjects of the Kingdom of Spain; that since the rendition of the decree herein said Mrs. M. M. Fisher has died, and her father, John

Blackadder, was authorized to prosecute this suit in behalf of the minor children of the said Mr. and Mrs. M. M. Fisher, until such time as the said M. M. Fisher could qualify as tutor. That the record further shows that said M. M. Fisher has qualified as tutor and filed his letters herein.

Now defendant shows that the said M. M. Fisher, being a subject of Spain he is unable to prosecute this suit and this suit should be abated because a state of war now exists between the Kingdom of Spain and the United States of America and all the subjects and citizens thereof.

Which matters and things the City of New Orleans avers to be true and pleads the same to the complainants' bill of complaint and humbly craves that this honorable court order the complainants to show cause herein on a day to be fixed why this suit should not be abated.

(Signed) SAM'L L. GILMORE,
J. J. McLOUGHLIN,
Solicitors.
W. C. FLOWER, *Mayor.*

I hereby certify that the foregoing plea of abatement is in my opinion well founded in law.

(Signed) SAM'L L. GILMORE,
J. J. McLOUGHLIN,
Solicitors.

STATE OF LOUISIANA,
City of New Orleans, Eastern District of Louisiana.

Before me, the undersigned authority, personally came and appeared Walter C. Flower, —, being by me duly sworn, deposes and says that he is the mayor of the city of New Orleans, and that the foregoing plea is not interposed for delay.

(Signed) W. C. FLOWER, *Mayor.*

Sworn to and subscribed before me this 23rd day of April, A. D. 1898.

[SEAL.] (Signed) WM. ANDREW COLLINS, JR.,
Not. Pub.

140 *Demurrer to Plea of Alienage.*

Filed April 27th, 1898.

Circuit Court of the U. S. for the Eastern Dist. of La.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. —.

John Fisher, the duly qualified tutor of his minor children by protestation and not confessing the matters and things contained in the plea herein filed by the City of New Orleans on the 23rd

day of April, 1898, does demur to said plea, on the following grounds:

1°. That said plea does not contain an allegation that this complainant is commorant in the enemy's territory, but on the contrary it appears from the record that said complainant is present in court and within the jurisdiction of this honorable court.

2°. That by virtue of section 4068 of the Revised Statutes of the United States and the treaty of commerce and amity between Spain and the United States entered into in 1795 and published in the Statutes at Large, v. 8, p. 144, article XIII, one year after the proclamation of war shall be allowed to the Spanish subjects for collecting and transporting their goods. That said section 4068 of the R. S. amplifies the powers thus allowed, by granting "for the recovery of his goods and effects."

3°. That under the international law the private debts of alien enemies are not the *the* subject of confiscation and only an act of Congress or a proclamation of the President of the United States can close the courts of this country to alien enemies residing in this country and no such act of Congress is alleged and no such proclamation has been made.

4°. That after judgment, no plea can be filed; that the cause is then adjudicated upon and the proper proceedings would be a bill for an injunction.

5°. That the plea herein filed is in law an odious plea and *stricti juris.*

6°. That even if it be conceded, that complainant is an alien enemy commorant in the enemy's country, which is not true, the distribution of this fund cannot for that reason be stayed, but the share accruing to your complainant would be retained by the court.

Wherefore complainant prays that for this and divers other causes, that the demurrer to the plea be sustained and the
141 plea overruled. Complainant further prays the judgment of the court whether he ought to make any further answer to said plea.

(Signed) CHAS. LOUQUE,
Solicitor for Complainant.

I hereby certify that in my opinion the above demurrer is well founded in point of law and is not interposed for delay.

(Signed) CHS. LOUQUE, *Solicitor.*

Replication to Plea.

Filed April 27, 1898.

Circuit Court of the U. S. for the Eastern Dist. of La.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

The complainant M. M. Fisher not waiving the demurrer herein filed now with the permission of the court first obtained put- at issue by this replication the truth of the allegation in the defendant's plea that he is an alien enemy.

He avers that he is a citizen of the British Empire and he now annexes proof of his everment.

Wherefore he prays that the plea in abatement be overruled and he prays for costs and general relief, &c.

(Signed) CHS. LOUQUE, *Solicitor.*

Affidavit of Chas. Louque.

Filed April 27, 1898.

Chs. Louque, being duly sworn, says that the allegation in the bill that complainant Mrs. M. M. Fisher was a Spanish subject was made by counsel from information received from her, that all the proceedings herein were conducted under the instructions of Mrs. M. M. Fisher, and it was only lately when Mr. John Fisher returned from Cuba to be qualified as natural tutor of his minor children that affiant learnt from him that he was a British subject.

(Signed) CHS. LOUQUE.

142 Sworn to and subscribed before me this 27 day of April, 1898.

(Signed) H. J. CARTER,
U. S. Commissioner.

Affidavits and Annexes Filed with Replication.

Filed April 27, 1898.

John Fisher being duly sworn says that he was born on the 20th of July, 1836, Main of Nairn, parish of Auchtergaven in the county of Perth, Scotland; that his father and mother were both natives of Scotland; that he remained in his native land until 1859 when he came to the United States; that affiant is a machinist by trade and that his occupation has called him in the island of Cuba at different periods since 1861 and that he reported himself to the British consulate in said island of Cuba and he is there registered as a British subject; that he has made an application to this court

to become a naturalized citizen of the United States on the 31st of January, 1896.

That he now annexes his certificate of birth and baptism and the certificate of his declaration to become a citizen of the U. S. as a part of this affidavit.

(Signed) JOHN FISHER.

Sworn to and subscribed before me this 27th day of April, 1898.

[SEAL.] (Signed) FRANK H. MORTIMER,
United States Commissioner.

UNITED STATES OF AMERICA:

Circuit Court of the United States for the Eastern District of Louisiana.

I, Edward R. Hunt, clerk of the said court, do hereby certify that on the 31 day of January, 1896, John Fisher, a white person, declared on oath, before the said circuit court of the United States for the eastern district of Louisiana, that he arrived in the United States in the year 1859, that it is, *bona fide*, his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, State or sovereignty whatever, and particularly to the Queen of Great Britain & Ireland being the sovereign whereof the said John Fisher was at the time a subject and that his oath is now of record in said court.

143 In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this 31 day of January in the year of our Lord 1896, and of the Independence of the United States, the 120 year.

[SEAL.] (Signed) E. R. HUNT, *Clerk*,
By H. J. CARTER, *D'y Clerk.*

Extract of an Entry in a Register Kept in the Undermentioned Parish or District.

In terms of 17° & 18° Vic., cap. 80, sect. 58, and 23° & 24° Vic., cap. 85, sect. 6.

John Fisher . Smith . Main of Nairn, had a son by his wife Emelia Dow, born July 20th, 1836, and baptised on the 4th day of August, 1836, named John.

Extracted from the register of births and baptisms for the parish of Auchtergaven, in the county of Perth, Scotland, this 17th day of October, 1882.

(Signed) DONALD CUMMING, *Registrar.*

(British postage & inland revenue stamp.)

The Registers of Births or Baptisms, Deaths or Burials, and Proclamations or Marriages kept in every Parish in Scotland prior to the 1st of January, 1820, have been transmitted, under the direction of the Sheriffs of the various Coun-

In terms of the 2d Section of the Act 23 & 24 Vic. c. 85, any Birth, Death or Marriage which shall have taken place in Scotland between 31st December, 1800, and 1st January, 1855, may be recorded at the General Registry Office, on the

es, to the General Registry Office for reservation; the portions of such regis-rs kept between the above date and he 1st of January, 1855, (when the new ystem of registration came into operation; being, in the meantime, in the ustody of the Registrars of the respective Parishes. Every person is entitled o search such Registers, and any relative nventories or Indexes in the custody of he Registrar, upon the days and during the hours of business fixed by the
144 Sheriff, or, where no special regulation has been made by him upon he subject, at all reasonable hours on any lawful day, on payment of a fee of 2s. for a General, and 1s. for a Particular Search, and to have an Extract of any Entry in the said Registers for the further sum of 2.1d., including Stamp Duty. In the case of a Particular Search, the applicant must indicate a particular name or entry; while in the case of a General Search, he does not require to specify the object of such search. Where any gratuitous search or Extract is required by or on behalf of a Pauper, the Registrar is entitled to include the cost thereof in his half-yearly account against the Parochial Board (23 & 24 Vict. c. 85, sec. 17). Every Extract of any Entry in the Register Books, kept under the provisions of the Registration Acts (18 & 18 Vict. c. 80, 18 Vict. c. 29, and 23 & 24 Vict. c. 85), duly authenticated and signed, is admissible as evidence in all parts of her Majesty's dominions without any other proof of such Entry.

authority of a warrant by the Sheriff of the County in which the event occurred, in the "Register of Neglected Entries."

The 62d Section of the Statute 17 & 18 Vic. c. 80 enacts, that "every person "who shall wilfully destroy, obliterate, "erase, or injure any Entry, or cause to "be destroyed, obliterated, erased, or "injured any such Register, or Duplicate "thereof, or any Minute, Notice, or Certificate made or given pursuant to this "Act, or shall falsely make or counterfeit, or cause to be falsely made or "counterfeited, any part of any such "Register or Duplicate, or any such "Minute, Notice, or Certificate, or shall "wilfully insert or make or cause to be "inserted or made in any such Register "or Duplicate any false or fictitious Entry of or any false statement touching "any Birth, Death or Marriage, or shall "wilfully give any false Certificate, or "falsify any Certificate, or shall certify "any Writing to be an Extract of any "such Register, knowing the same to be "false or fictitious in any part thereof, "shall be deemed guilty of an offence, "and on conviction thereof be liable to "be punished by Transportation for a "period not exceeding Seven Years, or "by Imprisonment for a period not exceeding Two Years."

Petition of Defendant for Rehearing, and Plea of Abatement Heard in Part, and Continuance.

Extract from the Minutes, April Term, 1898.

NEW ORLEANS, WEDNESDAY, *April* 27, 1898.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, district judge.

145 MRS. M. M. FISHER ET ALS. *vs.* CITY OF NEW ORLEANS. } No. 12516.

This cause came on to be heard upon the petition of defendant for a rehearing and upon the plea in abatement filed by defendant April 23 / 1898.

Present: J. J. McLoughlin, ass't city att'y for def't; C. Louque & E. H. McCaleb, of counsel for complainant and interveners, and was argued in part and continued until tomorrow at 11 a. m.

Order Overruling Plea of Alienage.

Extract from the Minutes, April Term, 1898.

NEW ORLEANS, THURSDAY, *April 28th*, 1898.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

MRS. M. M. FISHER
vs.
THE CITY OF NEW ORLEANS. } No. 12516.

On motion of Chs. Louque, solicitor for complainant, and on suggesting to the court that the plea herein filed came too late after judgment and that the demurrer thereto should be withdrawn and on further suggestion that the complainant, John Fisher, is a British subject as appears by his affidavit and certificate of birth and baptism and his declaration to become a citizen of the United States—and the affidavit of counsel all hereto annexed and made part hereof—

It is ordered that the plea of alienage herein filed be overruled.

Order Refusing Rehearing.

Entered and filed April 28, 1898.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET ALS. }

This cause came on to be heard at this term upon the peti-
146 tion of the defendant, The City of New Orleans, for a rehearing herein and was argued by the solicitors for the respective parties;

Whereupon and on consideration thereof it is ordered that a rehearing in this cause be, and the same is hereby, refused, and the court of its own motion orders that the final decree rendered herein on February 21, 1898, be, and the same is hereby, amended so as to only allow interest on the amount recovered, to wit: $71,139.60, from February 21, 1898, the date of said decree, instead of from Jan. 24, 1881, as heretofore allowed.

The clerk will note this amendment on the margin of said decree.

New Orleans, La., April 28th, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Circuit Court.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

Motion to Transfer by J. Venta to U. Koen & Co.

Filed April 28, 1898.

U. S. Circuit Court.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

THURSDAY, *the Twenty-eighth Day of April*, 1898.

Present: The Hon. George H. Theard, judge.

JOSE VENTA
vs.
BOARD OF SCHOOL DIRECTORS OF THE CITY OF NEW ORLEANS. } No. 35932.

On motion of Chas. Louque, attorney for Jose Venta, the plaintiff herein, and on suggesting to the court that the judgment herein was transferred on the seventh day of May, eighteen hundred and ninety-four, to Messrs. U. Koen & Co., composed of U. Koen
147 and B. B. Martinez, as appears by the written transfer hereto annexed and sworn to—

It is ordered by the court that the transferrees of said judgment Messrs. U. Koen & Co. be herein recognized as the owners thereof and subrogated to all the rights of said Jose Venta.

Extract from the minutes.

(Signed) A. H. FLEMING, *D'y Clerk.*

Report of E. D. Saunders, Special Master, on Petition of Charles Louque for Solicitor's Fee.

Filed May 21, 1898.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

In Equity.

The solicitors of the persons who have intervened in this case, namely, Messrs. E. H. McCaleb, Dinkelspeil & Hart and Charles J.

Theard, have filed a written consent that ten per cent. (10 %) upon the amount recovered and brought into court, would be a reasonable and proper allowance for the services rendered by Charles Louque, Esq., as solicitor herein, Mr. J. J. McLoughlin, solicitor for the city, neither opposes nor consents, but leaves the matter to the determination of the master and of the court.

I think that the charge agreed to by the other solicitors would be a proper charge in this case, and I accordingly recommend that the court allow Charles Louque, Esq., solicitor for the complainant herein, a fee to be calculated at ten per cent. on whatever amount may be recovered and brought into court by reason of this suit, or which, by reason of this suit, may be in any manner realized to the complainant and to the interveners herein. The fee, of course, will not be paid until something shall have been recovered and brought into court or realized to the parties. I annex to this report as part hereof, the written consent of the interveners.

(Signed) EUGENE D. SAUNDERS,
Special Master.

148 United States Circuit Court for the Fifth Circuit and Eastern District of Louisiana, New Orleans Division. In Equity.

The undersigned counsel for the intervening petitioners in this cause, hereby consent and agree that Charles Louque, Esq., shall be allowed reasonable counsel fees out of the fund recovered when brought into court for distribution in this cause, and hereby express their opinion that ten per centum (10 %) upon the amount so recovered and brought into court would be a reasonable, just and proper allowance for the services rendered by said solicitor herein.

New Orleans, February 24th, 1898.

(Signed) E. HOWARD McCALEB,
Solicitors for Mrs. A. B. Gage and U. Koen.

(Signed) DINKELSPEIL & HART,
Solicitors for H. Abraham and for Peter Johnson.

(Signed) CHARLES J. THEARD,
Solicitor for Ed. F. Duclaux.

Order Confirming Master's Report.

United States Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS. } No. 12516.

On motion of Chs. Louque *pa. pa.* and on suggesting to the court that E. D. Saunders, Esq., appointed special master herein, has made and filed his report on the fee to be allowed to mover, as solicitor; that said report was filed on the 21st day of May, 1898, and that more than thirty days have elapsed herein and no exception has been filed to said master's report;

It is ordered by the court that the report filed by Eugene D. Saunders, Esq., special master, on the fee to be allowed to Chs. Louque, solicitor herein, be now approved and confirmed.

(Signed) CHARLES PARLANGE,
U. S. Judge.

June 23, 1898.

149 *Assignment of Errors.*

Filed June 24, 1898.

United States Circuit Court for the Eastern District of Louisiana.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516. In Equity.

Assignment of errors.

Now comes The City of New Orleans, defendant and appellant and with its motion for appeal from the decree made February 21st, 1898, as amended April 28, 1898, makes the following assignment of errors:

I.

It was error for the court to decree judgment against the city for any part of the taxes of 1871, for the reason that the evidence shows that no part of complainant's claims arose during the year 1871, and further that the act of the legislature which directed the city to impose a special tax of ¼ % was passed in the year 1873; therefore could not affect the taxes of 1871.

Furthermore, it is error for the court to allow this decree against the city for taxes for 1871, for the reason that the complainant does not claim any share in the taxes of 1871, or any interest thereon either in her original or supplemental bill, and it was error for the court to allow her more than she claimed. Consequently the amount declared due out of taxes for 1871, to wit: seven thousand eight hundred and twenty-one 17/100 dollars, and the delinquent interest of taxes of 1871, nine thousand three hundred and thirty-two 81/100 dollars, were allowed in error, and should be deducted.

II.

This being a suit for an accounting, the court erred in giving judgment against the city for money that she never collected, in that the judgment includes the sum of eleven thousand nine hundred and thirty-three 27/100 dollars, which the master's report states is a discount allowed by the city to the tax-payer for payment of school taxes, and as the bill only claims and asks that the city be compelled to pay over the actual amount of cash collected, and as this money was never collected, we submit that it was error for the court to order it paid over. This being only a suit for an
150 accounting, judgment cannot be had in the bill for anything but actual money collected.

III.

The evidence shows that the full amount of money collected for 1874 school taxes was turned over to the school board (see testimony of Clark Steen and his report, offered in evidence by complainant), and such being the case it is urged that it was error for the court to make the city pay over any more money out of the taxes of 1874, the city having already paid over all that she owes on that year. Such being the case, the amount of $10,816.59 and $209.50, proportion of interest on school taxes for 1873, and the proper proportion of principal for school taxes for 1874 (to ascertain the amount of which a re-reference to the master is necessary), are not due to the school board. While it is true that all back taxes prior to 1879 are lumped into one fund, we urge that in calling for an accounting it is sufficient for the city to show, in order to be discharged as far as the taxes of any particular year are concerned, that she has paid over the full amount of taxes due the school board for that year, and having done this, with the taxes for 1874, it is error for the court to order her to turn over any more of the taxes for that year.

IV.

Complainant's judgment No. 12060, and her other judgments are law judgments, and she has ample remedy in law; hence, no right to invoke the equity side of the court.

V.

Complainant had no right to sue the city of New Orleans because her judgments are against the school board only, and she does not allege that the city owes the school board anything.

VI.

The evidence shows that in suit No. 12060 the city was garnisheed on July 12th, 1894, under a *fi. fa.*, and answered under oath that she had one thousand eight hundred and ninety-three 9/100 dollars to the credit of the school fund prior to 1879 on that date, and having paid that amount over to Mrs. Fisher under her judgment, it was error for the court not to hold that said payment to and acceptance by Mrs. Fisher, complainant herein, estopped her from traversing said garnishment, as she is doing by this proceeding, and the court should have held such payment and acceptance as an estoppel and *res judicata* concerning all collections made up to July 12, 1894.

VII.

The court erred in approving the finding of the master
151 that the interest or penalty on delinquent taxes formed a part of the taxes and should be turned over to the board. But even though this was correct (which course is not admitted) we hold that the court erred in ordering the city to pay over the penalty on the taxes which she had already paid over. In any event she

should not be compelled to pay over the penalty on any taxes, except on those taxes which are still in her possession. In other words, the master's report shows twenty-three thousand one hundred and eight 3/100 dollars of principal, and we submit that only the penalties on this twenty-three thousand one hundred and eight 3/100 dollars should be turned over and not the penalties on the taxes that were turned over to the board years ago.

VIII.

It was error for the court to have stricken from the records the two documents filed June 29th and July 1st, 1897, for the reason that they remained on the files from June to December without any objection on the part of the complainant, and it was too late then for her to make the objection she did on December 20th, 1897. The most that should have been required of defendants was to amend the plea to the jurisdiction by affixing the solicitor's certificate.

IX.

It was error for the court to refuse to allow defendants to file affidavit and plea to the jurisdiction, *ratione personæ*, December 20th, 1897, for the reason, that under the law, such a plea can be filed at any time; furthermore, as the city's plea and affidavit set up a charge of fraud against the complainant, in equity, such charge having been made, supported by affidavit, it was the duty of the court to entertain the plea, to let the fraud be proven.

X.

It was error for the court not to have allowed the plea of prescription made in the answers of defendants, for as the complainant's cause of action arose in 1873 and subsequent years, the last year being 1879, the same was prescribed by the prescription of ten years and consequently her suit would have been dismissed on the consideration of this plea.

XI.

Her judgment No. 12060 is based upon choses in action, and not sueable in this court and there is no allegation that the original assignors could sue in this court: therefore the court has no
152 jurisdiction *ratione materiæ*, and it was error for the court to assume jurisdiction herein.

XII.

The court erred in holding that the school taxes out of which said judgments have been made payable is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public schools of said city.

XIII.

The court erred in holding that there was any privity between the City of New Orleans and Mrs. Fisher, and in holding that she

has any right to claim an accounting from the City of New Orleans. Defendant city avers and declares that the only person who could call for such accounting is the said school board, the codefendant herein, and the court erred in permitting any other person than the school board to call for such accounting.

XIV.

It was error to order the whole fund ascertained by the master to be paid over to complainant, and interveners in this suit, because if said fund is a trust fund, it is held for the benefit of all interested in said fund, and the only part that should be paid to complainant and interveners is their proportion of same; in other words, it was error for the court to ignore the rights of other certificate-holders not party to this suit, and who were not notified by publication, or cited herein. And to ascertain what proportion of the fund should go to the complainant and interveners herein, a re-reference to the master is necessary.

Wherefore, for the errors assigned and others manifest in the record, said appellant prays that said decree may be reversed and remanded to said circuit court, with instructions to overrule the same and to decree accordingly.

(Signed) SAM'L L. GILMORE,
City Attorney,

(Signed) JAMES J. McLOUGHLIN,
Assistant City Attorney,
Solicitors for Defendants.

153 *Motion and Order for Appeal.*

Entered and filed June 24, 1898.

U. S. Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER
vs.
CITY OF NEW ORLEANS ET AL. } No. 12516.

In Equity.

To the honorable the judges of the United States circuit court for the fifth circuit and eastern district of Louisiana:

On motion of Sam'l L. Gilmore and James J. McLoughlin, solicitors for The City of New Orleans, one of the defendants, made in open court, suggesting that the said defendant is aggrieved by the final decree herein made on February 21, 1898, and amended at this term on April 28, 1898, and believes that there is error to her prejudice in the said final decree and desires to appeal therefrom and had filed an assignment of errors,

It is ordered that the defendant City of New Orleans, be granted an appeal from such decree to the United States circuit court of appeals for the fifth circuit, returnable within thirty days on giving

bond in the sum of five hundred dollars, with surety and conditioned as the law directs.

New Orleans, La., June 24, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Know all men by these presents, that we, The City of New Orleans, a municipal corporation, represented by and acting through Walter C. Flower, mayor, as principal, and George B. Penrose, of this city, as surety, are held and firmly bound unto Mrs. M. M. Fisher's heirs, administrators, executors and assigns, John Fisher, the minors, John Blackadder Fisher, James M. Fisher, William Gardner Fisher and Robert Blackadder Fisher, their father and tutor, John Fisher, John Blackadder, their *procpein ami*, F. J. Gasquet, Joseph Venta and his assigns or transferees, U. Koen & Co., and the members thereof, Mary Quinlan, and her husband, Jean Pomes, Georgiana T. Young, Lizzie G. Wheelwright, Mary A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier, Mrs. A. B. Gage, Wm. E. F. Duclaux and U. Koen, in the full and just sum of five hundred dollars, to be paid to the said Mrs. M. M. Fisher and the other
154 above-named appellees and obligees, their certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24 day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, lately at a circuit court of the United States for the eastern district of Louisiana, docket number 12516, in a suit depending in said court between the appellees and obligees above named, as complainants and interveners, and The City of New Orleans, *et al.*, as defendant- and appellant-, a decree was rendered against the said City of New Orleans, defendant and appellant, and the said City of New Orleans having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said appellees and obligees, complainants and interveners, citing and admonishing them to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date hereof.

Now, the condition of the above obligation is such that if the said City of New Orleans shall prosecute said appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) W. C. FLOWER, *Mayor.* [SEAL.]
GEO. B. PENROSE. [SEAL.]

Sealed and delivered in presence of—
JAMES J. McLOUGHLIN.

Approved by—
(Signed) CHARLES PARLANGE,
U. S. Judge.

THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to succession of Mrs. M. M. Fisher, through John Fisher, adm'r; John Fisher, tutor of the minors, John Blackadder Fisher, James M. Fisher, William Gardner Fisher, and Robert Blackadder Fisher; John Fisher, John Blackadder, F. J. Gasquet, Joseph Venta, U. Koen & Co., assigns of Venta; U. Koen, Mary Quinlan, Jean Pomes, Georgiana V. Young, now the wife of Dr. P. J. Friedrichs; Lizzie G. Wheel-
155 right, Mary A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier, Mrs. A. B. Gage, and Wm. E. F. Duclaux, Greeting:

You are hereby cited and admonished to be and appear at a circuit court of appeals of the United States, for the fifth circuit, to be holden at the city of New Orleans, within 30 days from date hereof, pursuant to a motion and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein The City of New Orleans is appellant, and you are appellees, No. 12516 of the docket thereof, to show cause, if any there be, why the judgment rendered against the said City of New Orleans, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 29th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

CHARLES PARLANGE, *Judge.*

Received by U. S. marshal, New Orleans, La., June 29th, '98, and on the 22nd day of July, 1898, personally appeared before the undersigned, H. J. Carter, U. S. commissioner for the eastern district of Louisiana, John Early, deputy U. S. marshal of the eastern district of Louisiana, who upon oath says that on the 30th June, 1898, he served the within citation on the succession of Mrs. M. M. Fisher, through John Fisher administrator, John Fisher tutor of the minors John Blackadder Fisher, James M. Fisher, William Gardner Fisher, and Robert Blackadder Fisher, John Fisher, John Blackadder, F. J. Gasquet, Joseph Venta, U. Koen & Co. assignee of Venta, U. Koen, Mary Quinlan, Jean Pomes, Georgiana V. Young, now the wife of Dr. P. J. Fredericks, Lizzie G. Wheelright, Mary A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier, Mrs. A. B. Gage and Widow E. F. Duclaux, by delivering a true copy thereof to each of their respective attorneys of record, in person, Dinkelspeil & Hart, Charles Louque, E. Howard McCaleb, Charles J. Theard, in the city of New Orleans, La.

JOHN EARLY,
Deputy U. S. Marshal.

Sworn to and subscribed before me this 22nd of July, 1898.

H. J. CARTER,
U. S. Commissioner.

(Indorsement:) Return. United States circuit court, eastern district of Louisiana. No. 12516. Mrs. M. M. Fisher *et als. vs.*
156 The City of New Orleans. Citation. Marshal's return. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed July 22, 1898. E. R. Hunt, clerk.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 193 pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of Mrs. M. M. Fisher *vs.* The City of New Orleans *et al.*, No. 12516 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 22 day of July, A. D. 1898.

[SEAL.] E. R. HUNT, *Clerk.*

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 22 day of July, A. D. 1898.

CHARLES PARLANGE, *Judge.*

157 *Transcript on Cross-appeal.*

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

JOHN FISHER, TUTOR, ET ALS. *versus* CITY OF NEW ORLEANS. } No. 12516. In Equity.

Petition for cross-appeal. Filed November 10, 1898.

To the hon. the circuit court of the U. S. for the eastern dist of La.:

The petition of John Fisher, herein acting as the duly qualified natural tutor of his minor children, herein joined by F. J. Gasquet, Jos. Venta and his transferee, U. Koen, Mary Quinlan, Jean Pomes, G. T. Young, L. G. Wheelright, M. A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier, Mrs. A. B. Gage, E. F. Duclaux and U. Koen, respectfully represents:

That an appeal, not to act as a supersedeas, has been taken from

the decree herein, by the City of New Orleans, returnable to the hon. the circuit court of appeals of the U. S. for this district.

That your petitioners, who are all appellees therein, aver that they are advised that they are aggrieved by the order dated April 28th, 1898, herein rendered, amending the said decree, so as to reduce the interest allowed by the decree, and they desire to submit the question to the appellate court.

Wherefore, petitioners pray that a cross-appeal be granted to them from the order of April 28th, 1898, amending the decree herein, returnable to the hon. the circuit court of appeals of the United States, for the fifth circuit, at the city of New Orleans, within thirty days, on petitioner- giving bond conditioned as the law directs, and petitioners pray for general relief, etc.

(Signed) CHS. LOUQUE, *Solicitor.*
(Signed) E. H. McCALEB,
For U. Koen & Mrs. Gage.

158 *Assignment of Errors.*

Appellants John Fisher, natural tutor & *als.*, now assign as error:

1°. That a new trial having been refused after the term during which decree was rendered the circuit court was without jurisdiction, under the equity rule No. 88 to amend its decree; and the other equity rules governing the practice of the court.

2°. That under the law and equity jurisprudence as well as under the Louisiana law, complainant and interveners were entitled to a decree carrying interest, as was allowed by the original decree.

Wherefore, appellants pray that the order of April 28th, 1898, amending the decree be cancelled and annulled; and they pray for general relief, &c.

(Signed) CHS. LOUQUE.
E. H. McCALEB, *Solicitor.*

Order.

Let, as within prayed for, an appeal, not to act as a supersedeas, be granted to petitioners on their giving bond conditioned as the law directs in the sum of two hundred dollars, returnable to the hon. the circuit court of appeals sitting in New Orleans, for the fifth circuit, and let citations issue according to law.

New Orleans, Nov. 10, '98.

(Signed) CHARLES PARLANGE,
U. S. Judge.

Bond.

Filed November 10, 1898.

Know all men by these presents, that we, John Fisher, natural tutor of his minor children, F. J. Gasquet, Jose Centa and transferee, U. Koen, Mary Quinlan, Jean Pomes, G. T. Young, L. G. Wheelright, M. A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier,

Mrs. A. B. Gage, E. T. Duclaux and U. Koen, as principal-, and —— ——, F. J. Quinlan, —— ——, as sureties, are held and firmly bound unto The City of New Orleans in the full and just sum of two hundred dollars to be paid to the said City of New Orleans, certain attorney, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8 day of November in the year of our Lord one thousand eight hundred and ninety-eight.

159 Whereas lately, at a session of the United States circuit court for the eastern district of Louisiana, in a suit depending in said court, between John Fisher, natural tutor of his minor children, F. J. Gasquet, Jose Venta and his transferee, U. Koen, Mary Quinlan, Jean Pomes, G. T. Young, L. G. Wheelright, M. A. Sullivan, Mary O'Donnel, Mrs. Mary Fortier and Mrs. A. B. Gage, E. T. Duclaux and U. Koen, compl'ts and interveners and The City of New Orleans, defendant, No. 12516, an order was rendered against the said John Fisher, tutor, *et als.*, on April 28, 1898, and the said John Fisher, natural tutor, Jose Venta, U. Koen, F. J. Gasquet, Mary Quinlan, Jean Pomes, G. T. Young, L. G. Wheelright, M. A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier, Mrs. A. B. Gage, E. T. Duclaux and U. Koen, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the order in the aforesaid suit, and a citation directed to the said City of New Orleans, citing and admonishing it to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said John Fisher, tutor, Jose Venta, F. J. Gasquet, U. Koen, transferee, Mary Quinlan, Jean Pomes, G. T. Young, L. G. Wheelwright, M. A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier, Mrs. A. B. Gage, E. T. Duclaux and U. Koen, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) CHS. LOUQUE, [SEAL.]
Att'y for Appellants.

(Signed) F. J. QUINLAN. [SEAL.]

Approved November 10th, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

(Indorsed:) No. 12516. John Fisher, tutor, *et als. vs.* City of New Orleans. Bond.

160 THE UNITED STATES OF AMERICA:

Circuit Court of Appeals of the United States, Fifth Judicial Circuit.

The President of the United States to the City of New Orleans, through W. C. Flower, mayor, Greeting:

You are hereby cited and admonished to be and appear at the circuit court of appeals of the United States to be holden at the city of New Orleans, within 30 days from date hereof, pursuant to a petition of appeals filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein the plaintiff is John Fisher, tutor, &c., and the defendant, The City of New Orleans, No. 12516, and there to show cause, if any there be, why the judgment rendered against the said appellant, etc., as in said petition mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 10th day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

CHARLES PARLANGE, *Judge.*

Marshal's Return.

Received by U. S. marshal, New Orleans, La. Nov. 10, '98.

On this 11th day of November, 1898, before the undersigned authority, personally appeared Felix Bienvenue, deputy United States marshal for the eastern district of Louisiana, personally known to me as such, who being duly sworn deposes and says that he served this writ on the City of New Orleans, Louisiana, by handing the same to Hon. Walter C. Flower, mayor of said city in person, at his office in said city, on the 11th day of November, 1898.

FELIX BIENVENUE,
Dep'y U. S. Marshal.

Sworn to and subscribed before me on this 11th day of November, 1898.

[SEAL.] H. J. CARTER,
U. S. Commissioner.

(Indorsement:) United States circuit court, eastern district of Louisiana. No. 12516. John Fisher, tutor, *et als. vs.* The City of New Orleans. Citation of appeal. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed Nov. 11, 1898. E. R. Hunt, clerk.

161 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, do hereby certify, that the foregoing six pages contain and form a full, complete, true and perfect transcript of the record and proceedings had, on cross-appeal of complainants and interveners in the case of John Fisher, tutor, *et als. vs.* City of New Orleans, No. 12516 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 12 day of November, A. D. 1898.

E. R. HUNT, *Clerk.*

[SEAL.]

I, Charles Parlange, United States judge for the eastern district of Louisiana, do certify, that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district this 12 day of November, A. D. 1898.

CHARLES PARLANGE, *Judge.*

162 (*Original Bond.*)

Know all men by these presents that we, John Fisher, natural tutor of his minor children, F. J. Gasquet, Jose Venta and transferee U. Koen, Mary Quinlan, Jean Pomes, G. T. Young, L. G. Wheelwright, M. A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier, Mrs. A. B. Gage, E. T. Duclaux, and U. Koen, as principal, and F. J. Quinlan, as surety, are held and firmly bound unto the City of New Orleans in the full and just sum of two hundred dollars, to be paid to the said City of New Orleans, certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 8 day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a session of the United States circuit court for the eastern district of Louisiana, in a suit depending in said court, between John Fisher, natural tutor of his minor children, F. J. Gasquet, Jose Venta and his transferee U. Koen, Mary Quinlan, Jean Pomes, G. T. Young, L. G. Wheelwright, M. A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier and Mrs. A. B. Gage, E. T. Duclaux and U. Koen, comp'l'ts and interveners, and The City of New Orleans, defendants, No. 12516, an order was rendered against

the said John Fisher, tutor, *et als.*, on April 28, 1898, and the said John Fisher, natural tutor, Jose Venta, U. Koen, F. J. Gasquet, Mary Quinlan, Jean Pomes, G. T. Young, L. G. Wheelwright, M. A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier, Mrs. A. B. Gage, E. T. Duclaux and U. Koen, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the order in the aforesaid suit, and a citation directed to the said City of New Orleans, citing and admonishing it to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said John Fisher, tutor, Jose Venta, F. J. Gasquet, U. Koen, transferee, Mary Quinlan, Jean Pomes, G. T. Young, L. G. Wheelwright, M. A. Sullivan, Mary O'Donnell, Mrs. Mary Fortier, Mrs. A. B. Gage, E. T. Duclaux and U. Koen, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CHS. LOUQUE, [SEAL.]
Attorney for Appellants.
F. J. QUINLAN. [SEAL.]

163 Approved November 10th, 1898.
CHARLES PARLANGE,
U. S. Judge.

(Indorsed:) No. 12516. John Fisher, tutor, *et als. vs.* City of New Orleans. Bond. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed Nov. 10, 1898. E. R. Hunt, clerk.

164 *Argument and Submission.*

November Term, 1898.

DECEMBER 12, 1898.

(Extract from Minutes.)

THE CITY OF NEW ORLEANS
vs.
JOHN FISHER, Tutor, etc., ET ALS. } No. 747.

This cause was regularly called this day, and was submitted to the court after argument by Mr. Branch K. Miller, and Mr. J. J. McLaughlin for the City of New Orleans, and by Mr. Charles Louque and Mr. E. Howard McCaleb for John Fisher.

Decree.

November Term, 1898.

TUESDAY, *January* 17, 1899.

(Extract from Minutes.)

THE CITY OF NEW ORLEANS
vs.
JOHN FISHER, Tutor, etc., ET ALS. } No. 747.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby amended so as to allow 5 % interest on the sum of $71,131.60, from January 24, 1881, and on the sum of $799.18, from May 8, 1897, and as so amended the said decree is affirmed.

It is further ordered, adjudged and decreed, that the appellant, The City of New Orleans, and the surety on the appeal bond herein, George B. Penrose, be condemned *in solido* to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

165 [Stamped:] U. S. circuit court of appeals. Filed Feb. 6, 1899. J. M. McKee.

United States Circuit Court of Appeals, Fifth Circuit.

CITY OF NEW ORLEANS ET AL., Plaintiffs in Error, Appellants,
versus
JOHN FISHER, Tutor, ET ALS., Defendants in Error, Appellees. } No. 747.

To the honorable judges of the United States circuit court of appeals for the fifth circuit:

The petition of The City of New Orleans (herein represented by Walter C. Flower, mayor), plaintiff in error herein, and of The Board of School Directors for the Parish of Orleans (herein represented by Ernest B. Kruttschnitt, its president), also plaintiff in error herein, respectfully shows that petitioners believe there is error to their prejudice in the decree of this honorable court herein, and they desire to, and do hereby, apply to and petition this honorable court to grant them a rehearing herein, for the purpose of correcting the errors, mistakes and inadvertences in said decree; and defendants say that said decree is erroneous and to their prejudice, because:

That since their appeal was filed in this cause, and before the

cross-appeal was taken by the defendants in error herein,
166 the said defendants in error brought a proceeding in the circuit court of the United States of the fifth circuit and eastern district of Louisiana, entitled United States *ex rel.* John Fisher, tutor, etc., *vs.* Board of Liquidation, No. 12740, of the docket of said circuit court, wherein said Fisher *et als.* admitted, under oath, that the judgment obtained in this proceeding, No. 12516 of the docket of said court, for $71,938.74, with legal interest from February 21, 1898, was final, and they ask said court, in said proceeding No. 12740, to grant them a mandamus, directed against The Board of Liquidation, for payment of this judgment.

Your petitioners represent that this is newly discovered evidence arising since the appeal herein was taken to this honorable court, and that the whole record of the said suit No. 12740 is now lodged in this honorable court of appeals as No. 746 of the docket thereof, and your petitioners pray leave to have the same filed herein, and considered in connection with and as a part of this petition for rehearing.

Now your petitioners show that said suit No. 12470 and said prayer for mandamus constitute a full and final acquiescence in the judgment and decree rendered in the instant case No. 747 of this court and No. 12516 of the United States circuit court; and that by their action in taking said proceeding, said defendants in error are estopped and precluded from asking any amendment of said judgment which might increase the amount of the same.

Petitioners further show that the court erred in refusing to take notice of the fact which is apparent on the face of the record, to wit: that Mrs. M. M. Fisher is not a subject of Spain, but on the contrary is a citizen of Louisiana.

Petitioners show that the judgment in this case is solely in
167 favor of Mrs. M. M. Fisher, and that her death certificate, which is found on page 129 of the transcript, shows that she was a native of Virginia, and had lived in New Orleans for thirty-eight years prior to her death. And your petitioners show that the affidavit of solicitor for Mrs. Fisher, which is found on page 141 of the transcript, sets forth as a fact that the statement that she and her husband are Spanish subjects, was wrong, and that on the contrary he is a British subject, and had never been a Spaniard. And this statement relative to John Fisher is corroborated by his own affidavit printed on page 142 of the transcript. Consequently, petitioners believe that it was error for the court not to have taken notice of these facts, which are apparent on the face of the record, and also of the fact that these statements were made after the decree had been rendered by the court below, and no opportunity was given petitioners to traverse the same.

Your petitioners further claim and show, that there was error on the part of this court in refusing to go behind the judgment originally obtained by Mrs. M. M. Fisher in suit 12060 (page 60 of the transcript), in order to ascertain the fact as to whether or not the record of that case showed that Mrs. M. M. Fisher was entitled, under her pleadings, to avail herself of the jurisdiction of the United

States circuit court, and in support of which contention petitioners again cite the case of Wisconsin *vs.* Pelican Insurance Company, 127 U. S., 292, and New Orleans *vs.* Benjamin, 153 U. S., 411.

Petitioners also claim that there is error in the opinion and decree of this honorable court in its reasoning upon the sixth assignment of error, to wit: "That in the view of the court the garnishment proceedings shown in the record were against the treasurer of the city of New Orleans as *ex officio* treasurer of the school board," whereas in point of fact the record shows that there were two separate garnishments or *fi. fa.* proceedings taken; one on page 120 of
168 the transcript shows: that the marshal collected $312.56 from Charles H. Schenck, treasurer of the city of New Orleans, and the other on pages 121 and 122 of the transcript in answer to the garnishment shows that Charles H. Schenck, treasurer of the city of New Orleans and *ex officio* treasurer of the board of school directors, had in his hands $1,893.09, which was duly paid over to Mrs. Fisher.

And your petitioners show that these two separate answers and returns show that Mr. Schenck was garnisheed in two different capacities. First, as treasurer of the city of New Orleans, and, second, as treasurer of the school board. Consequently, under the law the return under the garnishment as treasurer of the city of New Orleans should be held as constituting an accounting up to that date between the plaintiff in this proceeding, the school board and the city of New Orleans.

Your petitioners further believe that there is error of the court in its statement relative to the ninth assignment of error, which reads as follows: "The ninth assignment of error does not appear to be based on any affirmative ruling of the court below. It appears that leave was asked to file a plea to the jurisdiction and an order to show cause issued, but no ruling made in the premises."

Your petitioners, in support of this contention, respectfully refer your honors to the plea itself, which is found on page 49 of the transcript, and to the order and ruling of the court relative to the same, which are found on page 51 of the transcript, and which read as follows:

169 "Extract from the Minutes.

November Term, 1897.

NEW ORLEANS, MONDAY, *December* 20, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

MRS. M. M. FISHER
versus
CITY OF NEW ORLEANS. } No. 12516.

This day, in open court, J. J. McLoughlin, assistant city attorney, of counsel for defendant, presented a plea to the jurisdiction and a motion to file same.

Whereupon counsel for complainant and intervenors objected to the filing of the same on the grounds urged by them. After hearing the counsel for both parties the court refused the application to file said plea at this time."

And it is this ruling of the court below which petitioners respectfully say was an error of that court, and we ask your honors' review of the same.

The law makes it the duty of the court at any time that it becomes apparent that a fraud has been perpetrated upon the court, and jurisdiction has been acquired by fraud, to stop the proceedings and investigate the question of jurisdiction. In support of which contention we refer your honors to the fact that the plea of fraud and want of jurisdiction was raised by your petitioners, as appears from the plea found on page 49 of the transcript, and the judge below was wrong in the order which he made when same was presented to and argued before him, and which order is found on page 51 of the transcript, as aforesaid, refusing leave to file same.

Under this state of facts we claim that the court should
170. be guided by the principle laid down by the Supreme Court in Grace *vs.* Insurance Company, 109 U. S., 278, and thereunder remand this cause to the circuit court with orders to consider and try this sworn plea of fraud and lack of jurisdiction.

Petitioners believe the court erred in holding in its reasons for overruling the seventh assignment of errors that the city is liable for interest collected on back school taxes. We respectfully submit that there is no authority cited by the defendants in error or by the court in support of the contention that the interest is a part of the taxes, and on the contrary authorities were cited in our brief, all holding that penalties form no part of the tax, and we respectfully urge upon the court to reconsider this question, as we believe a consideration of the fact that we have cited numerous authorities in support of our contention, and our opponents have not cited a single decision in their favor, should be construed as a recognition of our position.

We also respectfully submit that there is error in the court's conclusion that sec. 3015 of the Civil Code applies to the city of New Orleans.

The city was not a voluntary trustee in this matter; the collection of this money was forced upon her, and she had to collect it entirely at her own expense. Besides, the city charter of 1882 set aside all money collected from interest on delinquent city taxes as sacred to the public improvement fund, and the city has already expended that money on public improvements, as ordered by the act 20 of 1882, sec. 65, and it is wrong for the court to require her now, after she has expended it for that purpose under the mandate of the law to turn it over to creditors of the school board nearly twenty years after its collection and disbursement.

Wherefore, petitioners, plaintiffs in error, pray that this
171 petition for a rehearing be filed and considered, and that notice thereof be given to all parties in interest. And that,

after due consideration and hearing, this petition be granted and a rehearing had, and that the decree hereinbefore rendered be modified or set aside, so as to grant to petitioners the relief prayed for.

And your petitioners further pray that in any event so much of your decree as increases the amount of said judgment as originally fixed by the decree of the lower court be set aside, and that the cross-appeal of said defendants in error be dismissed upon consideration of the transcript and proceedings No. 746 of the docket of this honorable court, which your petitioners plead as *res adjudicata* to the demands of said cross-appeal.

And petitioners pray for such orders, rulings, process and decrees herein as may do justice and equity to and between all parties herein involved.

And petitioners pray for all special, equitable and general relief.

JAMES J. McLOUGHLIN,
Assistant City Attorney,
SAM'L L. GILMORE,
City Attorney,
Solicitors for Plaintiffs in Error.

I, the undersigned solicitor for the City of New Orleans and Board of School Directors for the Parish of Orleans, hereby certify that in my opinion the foregoing petition and the reasons given therein as grounds for a rehearing are good in law.

JAMES J. McLOUGHLIN, *Solicitor.*

New Orleans, February 4, 1899.

172 *Rehearing Denied.*

November Term, 1898, February 21, 1899.

(Extract from Minutes.)

THE CITY OF NEW ORLEANS
vs.
JOHN FISHER, Tutor, ET ALS. } No. 747.

Ordered, that the petition for rehearing filed in this cause be and the same is hereby denied.

Opinion.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1898.

CITY OF NEW ORLEANS, Appellant,
vs.
JOHN FISHER, Tutor, ET ALS., Appellees. } No. 747.

Appeal from the circuit court of the United States, eastern district of Louisiana.

Before Pardee and McCormick, circuit judges, and Boarman, district judge.

This suit was commenced by a bill brought by Mrs. M. M. Fisher, joined and authorized by her husband, John Fisher, of Cuba, and citizens of the Kingdom of Spain, against the City of New Orleans; and in said bill it was alleged that she recovered a judgment in this hon. court against the Board of School Directors, a corporation created by the laws of the State of Louisiana and a citizen thereof, in the sum of more than ten thousand dollars, as more fully appears by the record of said suit. "That your oratrix obtained two other judgments against the same school board before the civil district court for the parish of Orleans, amounting in the aggregate to many thousand dollars.

That all of said judgments are now final, that they are made payable out of the school taxes levied by the City of New Orleans prior to 1879.

Your oratrix avers that the school taxes out of which said judgments have been made payable is a trust fund levied by the City of New Orleans for the purpose of paying the expenses of the public schools of the City of New Orleans.

173 1st. That the City of New Orleans has failed to collect the said taxes punctually and that it was through her fault and negligence that the same remains uncollected, and by reason of her neglect she has become liable for the amount of taxes yet remaining uncollected.

2d. Your oratrix further complains and says that said taxes, under the law, carried interest at the rate of ten per cent. per annum, and that the City of New Orleans has never paid to the school board any of the interest due on said taxes, but she has misapplied and diverted the same to other unlawful uses.

3d. Your oratrix further avers that the school board created the obligation against said school taxes, by virtue of contracts which were legally entered into and your oratrix was protected by the Constitution of the United States from any impairment of her contract.

That in violation of this constitutional right, the State of Louisiana passed act 82 of 1884, which directed that the property of the delinquent tax-payers should be sold for what it would bring and that all taxes due thereon should by virtue of said sale be canceled.

That by reason of said law, the City of New Orleans allowed the property on which the school taxes were due to be sold for State taxes, and she caused the city taxes, including the school taxes, to be canceled; that she was thus guilty: 1st. As a delinquent trustee for not having enforced the collection of the said tax; and 2d. For having failed to protect the interest of your oratrix in said State tax sale; that the cancellations thus made amount to many thousands of dollars.

4th. That the said City of New Orleans at various times passed ordinances cancelling and annulling the said taxes and remitting the interest thereon.

That your oratrix is unable to give the exact amount of each kind of violations of her obligations by the trustee, and it is absolutely necessary to make the City of New Orleans account for the various amounts which have been lost to your oratrix through the unfaithfulness of said trustee.

That the Board of School Directors, to whom the City of New Orleans should account, have refused to demand such an
174 account, and will continue so to do, and your oratrix would be left without a remedy.

That the fund which the City of New Orleans administers seems now to be insufficient to satisfy the demands of all the creditors who are entitled to be paid out of the same.

Your oratrix further avers that her judgments are made directly payable out of the school taxes levied prior to 1879, and she has an equitable lien there against — enforceable before a court of equity.

She further avers that under the law, her certificates, which are merged in her judgments, have been, under the law, received by the City of New Orleans directly, in payment of the school taxes, without the intervention of the Board of School Directors.

That for those reasons your oratrix brings her bill against the City of New Orleans and the Board of Directors of the City Schools of New Orleans for an account.

Your oratrix brings this bill for herself and all parties similarly situated who are willing to appear and contribute to the costs thereof, they being too numerous to be made parties hereto.

May it please your honors to grant unto your oratrix a writ of subpœna to be directed to the City of New Orleans, through its mayor, and to the School Board of the City Schools of New Orleans, E. B. Kruttschnitt, thereby commanding them and each of them, on the first Monday in June, 1896, under the penalties therein, to be limited, personally to appear before this hon. court, then and there full, true, direct and perfect answer make to all and singular the premises, and further to stand to, abide, perform such further orders, direction and decree that this hon. court may make, and to give a full, fair and perfect account of all the school taxes collected by the City of New Orleans for the years 1873, 1874, 1875, 1876, 1877 and 1878; of all the interest received thereon by said city and never accounted for, of all the taxes which were not collected for want of proper enforcement, and which have since been canceled, both sales made by the State tax collectors and by ordinance

adopted by the city council; and your oratrix further prays for all general and particular relief as shall seem agreeable to equity and good conscience."

175 On June 1, 1896, the City of New Orleans, through its city attorney entered its appearance. Afterwards, on August 24, 1896, a so-called supplemental bill was filed, wherein it was alleged:

"Your oratrix avers that the City of New Orleans has at various times seized for the taxes due, for the years during which her claim arose, a number of houses and lots, and has purchased the same in satisfaction of the taxes due, and that a resulting trust has, under the law, followed the said property, and your oratrix is entitled to have the value of said real estate realized upon and the rents accounted for by the City of New Orleans.

Your oratrix is unable to give an exact statement of the houses and properties so purchased by the City of New Orleans, but she avers that the same largely exceeds thirty thousand dollars; that said city allows said property to go to waste and your oratrix avers that she has a statutory lien on all of said property under the laws of the United States, and that she is entitled to the appointment of receiver to take charge of same and realize under order of court.

That the acts complained of are contrary to equity and your oratrix has no rights save before the equitable jurisdiction of this hon. court.

Your oratrix brings this, her bill, for her own benefit and for all other persons in her same situation.

May it please your honors to grant unto your oratrix a receiver to take charge of the property purchased by the City of New Orleans for the taxes 1874 to 1879, inclusive, with such powers as receivers generally possess and more especially to be mentioned in the order appointing him, and your oratrix further prays that this supplemental bill be filed and that the City of New Orleans, through the mayor thereof, be ordered to show cause on such day as this hon. court may fix, why the prayer herein for receiver should not be granted and your oratrix prays for general relief."

General demurrers were filed to the original and amended bills which were afterwards overruled. On March 12, 1897, the City of New Orleans filed answer, substantially, as follows:

176 I.

"Defendant admits that oratrix recovered judgments against the Board of School Directors, a corporation of the State of Louisiana, and a citizen thereof, both in this honorable court and in the civil district court for the parish of Orleans, as is set forth in oratrix's bill of complaint and records annexed thereto and referred to therein.

II.

Defendant admits that all of said judgments are now final and are payable as decreed and provided for in the said judgments.

III.

Defendant denies that the school taxes out of which said judgments have been made payable is a trust fund levied by the City of New Orleans for the purpose of paying the expenses of the public schools of said city.

IV.

Defendant denies that it has ever failed to collect said taxes punctually, and denies that any of the same remain uncollected, and denies that if any of the same remain uncollected, they so remain by reason of any negligence on the part of this defendant, and denies that defendant is liable at all for the amount of any such taxes yet remaining uncollected, if any such there be.

V.

Defendant admits that the City of New Orleans has never paid to the school board any interest which she may have collected on any back taxes, and defendant denies that any such interest, if same has ever been collected, was due to the school board, and defendant denies that she has ever misapplied or diverted to unlawful uses any interest that she may have collected from delinquent tax-payers or back taxes, and defendant avers and shows that by express provision of law all interest which she may collect on any back taxes is especially set aside for certain purposes and cannot by her be used for school purposes or for any other purpose than that commanded by law.

VI.

177 Defendant denies that the school board created the obligation against the school taxes set forth in oratrix's bill of complaint by virtue of any contracts legally entered into, and denies that the oratrix has any right to invoke the protection of the Constitution of the United States herein, and denies that the provisions of the same regarding impairment of contracts have been in any manner violated by this defendant.

VII.

Defendant denies that act No. 82 of 1884 was passed in violation of any constitutional rights *on* oratrix in the premises, and defendant declares that whatever was done by the State of Louisiana in passing the said act, if it was done, was within the legislative authority, and the said taxes and legislative provisions were subject to change, amendment and repeal by the same authority which created them, and defendant shows and avers that the City of New Orleans had no authority or control over the action of the legislature in the premises.

VIII.

Defendant denies that the City of New Orleans allowed any property on which school taxes were due, to be sold for said taxes, and denies that she caused the city taxes, including the school taxes, to be canceled.

IX.

Defendant denies that she has been or is guilty as a delinquent trustee for not having enforced the collection of said taxes, denies that she ever was a trustee in the matter, denies that she ever failed to enforce the collection of any taxes which it was her duty to enforce, denies that it ever was her duty to protect the interests, if any she had, of oratrix, at said tax sales, denies that oratrix had any such interest, and denies that there were any such tax sales.

X.

Defendant denies that any cancellations amounting to many thousands of dollars, or to any amount, were made by reason of said sales, as set forth in oratrix's bill of complaint.

XI.

178 Defendant denies that the City of New Orleans passed ordinances cancelling and annulling any taxes, or remitting any interest thereon, but if any taxes were so cancelled or remitted, defendant avers the same was done by authority of law or by judgment of a competent court. Defendant denies that there was or is any obligation on the part of the city to account either to the school board or to the oratrix for any taxes, moneys or appropriations such as are set forth in oratrix's bill of complaint.

XII.

Defendant denies that it was the duty of the school board to call this defendant to account, and denies that the school board or the oratrix herein has any cause of action against this defendant for such an account. Defendant denies that there was any privity between the school board and this defendant, or between Mrs. Fisher and this defendant. And further answering, defendant says, that if any such cause of action for an accounting ever did exist in favor of said school board or of said oratrix, the same was effective and executory in the year 1880, and became actionable and exegent in the year 1880, and in the years following the year 1873 up to 1879, inclusive. That said action of accounting was personal to said school board and could only be exercised and availed of by the said school board, which action is prescribed by the lapse of ten years from and after each of the said years, and that oratrix has no right or cause of action in the premises.

XIII.

Defendant denies that there is any fund now administered, or which ever was administered by the city of New Orleans, derived either from appropriations, taxes, or money said to be due said school board, and denies that if there is or was any such fund, that the said school board or oratrix has any rights in the premises.

XIV.

Defendant admits that the judgments of oratrix are payable as stipulated in said judgments, but denies that oratrix has any equitable lien enforceable against the city of New Orleans before a court of equity by reason thereof.

XV.

179 Defendant denies that under the law were the services which she alleges have been merged in her judgments, ever received by the city of New Orleans, directly in payment of the school taxes without the intervention of the board of school directors.

XVI.

Defendant denies that the city of New Orleans has, at various times for the taxes due for the years during which oratrix' claim is alleged to have arisen, sold for taxes and purchased in satisfaction thereof a number of houses and lots, and particularly denies that any school taxes are due and payable on any such property, if any such has been bought, and denies that if any such property has been bought, any resulting trust has, under the law, followed said property, and denies that oratrix would, in any event, be entitled to have the value of said real estate realized upon, or the rents accounted for by the city of New Orleans.

XVI.

Defendant denies that the city of New Orleans purchased houses and properties, as charged in oratrix' supplemental bill of complaint, to the extent of $30,000 or any part thereof.

XVII.

Defendant denies that the city has any property upon which oratrix has any statutory lien under any law of the United States, and denies that she has allowed to go to waste any property of any description which is, or has been in her possession, and denies that oratrix is entitled to have a receiver appointed to take charge of any property owned or held by this defendant.

XVIII.

Defendant denies that any acts which have been done by her are contrary to equity, and defendant denies that the oratrix has any right or reason to invoke the equitable jurisdiction of this honorable court.

Further answering, defendant shows that there does not appear in the bills of complaint of oratrix herein any allegation of any indebtedness by the city of New Orleans to the said school board,

180 and that without having made said allegation oratrix is without right to proceed against this defendant herein.

Further answering, defendant shows and avers that it has been

decreed in the judgments of oratrix herein sued on, and in other suits of a similar nature, by other parties, against the city of New Orleans, that oratrix and such other complainants have no cause of action against the city of New Orleans on account of the claims of the character sued on in the judgments hereinbefore referred to."

Replication having been filed to this answer on March 22, 1897, the court ordered a reference to a master, "to take a full, true, fair and perfect account of all the funds, principal and interest received by the city of New Orleans from the school taxes levied in 1871, 1873, 1874, 1875, 1876, 1877 and 1878, of all interest remitted illegally, of all properties purchased for said taxes, as more fully prayed in the bill and the supplemental bill filed herein and to that effect the parties shall produce before said master all books, papers, documents to be examined and which may be necessary or proper in the premises."

At this stage of the proceeding numerous intervenors, claiming to have judgments against the school board in all respects similar to the judgments of Mrs. Fisher, intervened, asking to share in the proceeds of any amounts found due by the city of New Orleans on the accounting.

May 22, 1897, the master reported as follows:

"1st. The city of New Orleans owes the school board for the principal of school taxes collected and not paid over from the years 1871 to 1878, both inclusive, the amount of $23,180.03.

2d. The proportion of the interest actually collected by the city of New Orleans on the taxes of the years 1871 to 1878, both inclusive, up to January 1st, 1897, to which the school board will be entitled, if it is entitled to the same proportion of the interest as of the principal of said taxes, is $48,758.75.

It is a question of law whether the school board is entitled to any part of the interest. I think it is—the interest as a mere accessory of the principal belongs in my opinion to the same person to whom the principal belongs. Accordingly in my opinion the
181 amount the city of New Orleans now owes to the school board for taxes collected, and for interest on the taxes collected, is as above stated, $71,938.78.

3d. Properties bought in.

The complainant abandoned the attempt to show that the city owed anything on account of properties purchased for taxes.

4th. Interest illegally remitted.

The complainant claims that the city should be further charged with interest on the portion of the taxes accruing to the school-tax fund, whether such interest was actually collected by the city or not. In view of the great length of time that has lapsed, and the almost impossibility of proving now whether the interest was collected or not, and in view of the fact that under the assessment-rolls there always is an uncollectible amount of interest, I do not think that the city ought to be charged with the interest which she is not shown to have collected. No evidence of any kind was adduced before me on this subject. It was not shown that any part of the

uncollectible interest could have been collected or was illegally remitted. I, therefore, find that the city is not chargeable with the calculated amount of interest not collected.

By agreement of the parties, the fees of the experts herein were fixed at two hundred and fifty dollars ($250.00) to each of them, or five hundred dollars ($500.00) to the two. The bill of R. H. Carter, the stenographer, for evidence taken in this case is $21.50.

I further find that the following parties have proved their claims against the fund herein, by judgments rendered in their favor against the school board, in the civil district court for the parish of Orleans, namely:

M. M. Fisher	$11,094.87
" "	8,802.39
" "	5,864.64
" "	57,059.69
F. J. Gasquet	21,297.72"
Jose Venta	

This report was accompanied by two exhibits showing the methods by which the amounts collected by the city and due the school board had been ascertained.

182 March 31, 1897, the complainant with several intervenors filed exceptions to the master's report, as follows:

" First exception. That the master failed to reserve the rights of these plaintiffs and intervenors to the interest money collected by the city of New Orleans for the school fund since January, 1881.

Your exceptors aver that in the bill of complaint herein, it was averred that the city of New Orleans had remitted a large amount of interest to the tax-payers, and an attempt was made to hold the said city liable for said interest which it was averred was illegally remitted.

That on an examination of the accounts your exceptors discovered that the greatest deficit came not from the interest illegally remitted, but from a contract made by the city of New Orleans in 1881 with the civil sheriff, by virtue of which all the interest accrued on the taxes was given and allowed to the sheriff as a part consideration of his services.

That the city of New Orleans had no power or right under the constitution to increase the compensation of any officer, and said contract was *ultra vires* as trustee, and not binding on the *cestui que trust*.

That your exceptors were delayed already so long by litigation in the enforcement of their claim that they preferred that their right to further accounting should be reserved, than to file a supplemental bill with the permission of this honorable court; that, therefore, the rights of your exceptors to a further accounting on that head should have been reserved by the master and should be so now reserved by this hon. court.

Second exception. Your exceptors aver that they found it extremely difficult and a work of great magnitude to arrive at the properties purchased by the city for the taxes, and for the time

being your exceptors were not able to get at the correct description of said properties.

That the officers of New Orleans are busy with the regular duties, and your exceptors did not deem it expedient at the present juncture to enforce their rights to an account of said properties, and their rights should be reserved.

Third exception. That the master failed to allow any in-
183 terest on the moneys received by the city of New Orleans from the time the same was payable.

That your exceptors are entitled to interest with an annual rest, according to the rules and principles of equity and jurisprudence; but they will content themselves with simple interest, reserving their rights to a further account when found necessary."

And on June 7, 1897, the City of New Orleans filed exceptions to the report of the master, as follows:

"Defendant excepts to that part of the report of the master wherein he expresses his opinion that the interest on taxes is a mere accessory of the principal, and belongs to the person to whom the principal belongs, and that, therefore, in his opinion, the city of New Orleans owes the school board for taxes collected and interest collected. Exceptor excepts to this on the ground that:

1st. It was no part of the master's duty, under his reference, to decide this question or to express any opinion upon the question of law involved therein, but in the event that the court overrules this exception and holds that such was his duty, then, and in that case, the City of New Orleans excepts to his conclusions of law, and asserts that, on the contrary, his conclusion is erroneous; that the interest does not follow the taxes, and does not belong to the party to whom the taxes belong.

Defendant excepts to the statement of the master that the amount reported as collected out of the school taxes from 1871 to 1878, inclusive, is due by the city to the school board or to the board of liquidation, at any time, since its collection."

On June 27, 1897, the City of New Orleans filed what it denominated an exception to the jurisdiction of the court *ratione materia* and *personæ*, therein averring "that plaintiff's petition contains no averment that the suit could have been maintained by the assignors of the claim sued upon by Mrs. M. M. Fisher in the suit which forms the basis of this action." And on July 1, 1897, the City of New Orleans filed an alleged plea in abatement to the same purport as the above-entitled exception. This exception and this plea were afterwards stricken from the files as irregular and not
184 filed in accordance with the rules. Thereafter, the City of New Orleans offered in open court to file a plea further attacking the jurisdiction of the court, which leave was refused; and, finally, on January 22, 1898, the case came on for final hearing upon the bill, answer, replication, exhibits, proof and testimony and master's report. Whereupon, February 21, 1898, the court rendered judgment in favor of the complainant and intervenors (with other details not necessary to recite) as follows:

"It is ordered, adjudged and decreed that the city of New Orleans

trustee of the special school taxes, levied and collected for the years 1871 to 1878, inclusive, be condemned to pay pl'ff and intervenors the said taxes, received and collected by her, as follows: seventy-one thousand nine hundred and thirty-eight $\frac{18}{100}$ dollars with five per cent. interest per annum on $71,139\frac{60}{100}$ from January 24th, 1881, and on $799\frac{18}{100}$ from May 11th, 1896, until paid; and it is further ordered that this bill be retained for a further accounting and such orders and decrees as may be necessary."

On April 23, 1898, the City of New Orleans filed a petition for a rehearing on numerous grounds, which was ordered filed and fixed for hearing. Pending the rehearing, the November term, 1897, of the circuit court adjourned and the April term, 1898, was opened, at which term the court passed upon the petition for rehearing, as follows:

"Whereupon and on consideration thereof, it is ordered that a rehearing in this cause be and the same is hereby refused, and the court of its own motion orders that the final decree rendered herein on February 21, 1898, be and the same is hereby amended so as to only allow interest on the amount recovered, to wit: $71,139.60, from February 21, 1898, the date of said decree, instead of from January 24, 1881, as heretofore allowed.

The clerk will note this amendment on the margin of said decree."

Subsequent to the decree and prior to the decision upon the rehearing, a plea in abatement on the ground of alienage was put in
185 by the City of New Orleans to the effect that M. M. Fisher being a citizen of Spain, is unable to prosecute this suit, and the suit should be abated, because a state of war existed between the Kingdom of Spain and the United States of America and all the subjects and citizens thereof.

There was a demurrer to this plea of alienage on various grounds, but finally in the opinion of the court a sufficient answer was made thereto by proof that the complainant Fisher was not a citizen of Spain but was a citizen of Great Britain. From the decree of the circuit court, both parties have appealed.

PARDEE, circuit judge, delivered the opinion of the court:

There are fourteen assignments of error on the part of the City of New Orleans, many of which are argumentatively stated, but which we will consider in order, disregarding those argued in the briefs but not specifically assigned.

The first assignment of error is as follows:

"It was error for the court to decree judgment against the city for any part of the taxes of 1871, for the reason that the evidence shows that no part of complainant's claims arose during the year 1871, and further that the act of the legislature which directed the city to impose a special tax of $\frac{1}{4}\%$ was passed in the year 1873; therefore could not affect the taxes of 1871.

Furthermore, it is error for the court to allow this decree against the city for taxes for 1871, for the reason that the complainant does not claim any share in the taxes of 1871, or any interest thereon

either in her original or supplemental bill, and it was error for the court to allow her more than she claimed. Consequently the amount declared due out of taxes for 1871, to wit: seven thousand eight hundred and twenty-one $\frac{17}{100}$ dollars, and the delinquent interest of taxes of 1871, nine thousand three hundred and thirty-two $\frac{81}{100}$ dollars, were allowed in error, and should be deducted."

The grounds stated in this assignment form no part of the exceptions filed to the master's report, and it can hardly be said that the judge below erred in this respect when his attention does not
186 appear to have been called to it. Under article 254 of the constitution of 1879 and under act 49 of 1880, the taxes due the school fund previous to 1879 constitute but one fund. Fisher *vs.* School Board of the City of New Orleans, 44 An., 184; Gasquet *vs.* School Board, 45 An., 342; Fisher *vs.* School Board, 48 An., 1077. The record shows that the complainants' judgments are made payable out of the school taxes levied by the city of New Orleans prior to 1879. The prayer of the bill is for a full account and for general relief, and the order of reference specifies the school taxes levied in 1871 and is not complained of. The objection, if good, which we do not admit, comes too late.

The second assignment of error is as follows:

"This being a suit for an accounting, the court erred in giving judgment against the city for money that she never collected, in that the judgment includes the sum of eleven thousand nine hundred and thirty-three $\frac{27}{100}$ dollars, which the master's report states is a discount allowed by the city to the tax-payer for payment of school taxes, and as the bill only claims and asks that the city be compelled to pay over the actual amount of cash collected, and as this money was never collected, we submit that it was error for the court to order it paid over. This being only a suit for an accounting, judgment cannot be had in the bill for anything but money actually collected."

The question raised in this assignment does not appear to have been raised by exception to the master's report, and we fail to find in the master's report any reference to the special sum of $11,933.27 as a discount allowed by the city to tax-payers for the payment of school taxes. The act of 1874, No. 41, page 78, which provided for rebates or discount on taxes paid in full prior to the 20th of March in each year, expressly provided that no discount should be made upon school taxes. The matter herein urged is probably one of the details embraced in the special accountant's report upon which the master's report was made up. We are not disposed to follow the question through the exhibits, even if counsel should point the way. The assignment of error is not well taken.

The 3d assignment of error as follows:

187 "The evidence shows that the full amount of money collected for 1874 school taxes was turned over to the school board (see testimony of Clark Steen and his report offered in evidence by complainant), and such being the case, it is urged that it was error for the court to make the city pay over any more money

of the taxes of 1874, the city having already paid over all that owes on that year. Such being the case, the amount of ,816.59 and $209.50, proportion of interest on school taxes for 3, and the proper proportion of principal for school taxes for 4 (to ascertain the amount of which a re-reference to the master ıecessary), are not due to the school board. While it is true that back taxes prior to 1879 are lumped into one fund, we urge that calling for an accounting, it is sufficient for the city to show, in ler to be discharged as far as the taxes of any particular year are ıcerned, that she has paid over the full amount of taxes due the ool board for that year, and having done this, with the taxes for 4, it is error for the court to order her to turn over any more of taxes for that year,"

ses more matter involved in the master's report, of which no nplaint was made in the exceptions filed to the report, and the ignment need only be noticed, because it contains an admission t all the back taxes prior to 1879 were lumped into one fund.

The 4th assignment of error raises the question of the complain-'s remedy at law. A general demurrer was filed to the bill, and same was overruled and no assignment of error covers the same, less this 4th assignment be so considered. The counsel for the y of New Orleans say, in support of this assignment, "a reading he judgment," which is found in the transcript, "will show your nors that it is of such a nature that by garnishment proceedings could have obtained all needed relief under that judgment, and t that was all that was required and necessary to collect anything e her by the city or anything due the school board by the city. nsequently, as she has an adequate remedy at law, it is wrong to permit her to proceed in equity." On the other side, it is said, "solicitors for complainants have been litigating during these ten years and the only relief to be had is through the ıity court."

We consider the bill as a creditors' bill to reach equities exist-; between the school board of the city of New Orleans and the y of New Orleans in which an accounting between the two ties is necessary in order to ascertain the indebtedness of the y to the city school board. No such relief can be obtained at .

The 5th assignment of error is to the effect that complainant has right to sue the city of New Orleans, because her judgments are ainst the school board only and she does not allege that the city es the school board anything.

We think the issue of indebtedness of the city of New Orleans the school board is sufficiently asserted in the bills and is clearly t at issue in the answer.

The 6th assignment of error is as follows:

"The evidence shows that in suit No. 12060 the city was gar-heed on July 12th, 1894, under a *fi. fa.* and answered under oath t she had one thousand eight hundred and ninety-three $\frac{3}{100}$ dol-s to the credit of the school fund prior to 1879 on that date, and

having paid that amount over to Mrs. Fisher under her judgment, it was error for the court not to hold that said payment to and acceptance by Mrs. Fisher, complainant herein, estopped her from traversing said garnishment, as she is doing by this proceeding, and the court should have held such payment and acceptance as an estoppel and *res judicata* concerning all collections made up to July 12, 1894."

The proposition enunciated in this assignment of error is that an issuance of execution and garnishment proceedings thereunder operate an estoppel to a creditor's bill founded on the same judgment and seeking an accounting between the judgment debtor and the garnishee. If the general proposition should be conceded, its applicability in the present case is not apparent. In our view, the garnishment proceedings shown in this record were against the treasurer of the city and *ex officio* treasurer of the school board—a stakeholder—under which at law no accounting as between the city of New Orleans and the school board could have been had.

189 The 7th assignment of error is thus stated:

"The court erred in approving the finding of the master that the interest or penalty on delinquent taxes formed a part of the taxes and should be turned over to the board. But even though this was correct (which course is not admitted) we hold that the court erred in ordering the city to pay over the penalty on the taxes which she had already paid over. In any event she should not be compelled to pay over the penalty on any taxes, except on those taxes which are still in her possession. In other words, the master's report shows twenty-three thousand one hundred and eight $\frac{3}{100}$ dollars of principal, and we submit that only the penalties on this twenty-three thousand one hundred and eight $\frac{3}{100}$ dollars should be turned over, and not the penalties on the taxes that were turned over to the board years ago."

The assignment refers to the finding of the master's report holding the city liable for interest collected upon back school taxes. The master said: "It is a question of law whether the school board is entitled to any part of the interest—I think it is. The interest as a mere accessory of the principal belongs to the same person to whom the principal belongs." Under the law the school taxes carried ten per cent. interest per annum from the day they became delinquent. It was a penalty for non-payment of the taxes. This interest, or penalty, for delayed payment of school taxes formed no part of the city's proper revenues; the city, in collecting the same, was acting as a trustee for the school board. Delay in payment of taxes operated to the prejudice, not of the city but of the school fund and its creditors. We are unable to find any authority in law or morals for the city to appropriate to itself this interest. To allow such an appropriation would be to reward the city for its own negligence in the collection of the taxes due the school fund. We fully agree with the master that "the interest as a mere accessory of the principal belongs to the same person to whom the principal belongs." The assignment argumentatively claims that

if the city is liable for the interest on taxes collected, which
190 taxes have not been paid over, it is not liable for interest on taxes which it (the city) had collected, and, when paying over the taxes, had withheld. We are unable to see any difference in principle between the two cases.

The 8th assignment of error complains of the action of the court below in striking from the records two certain documents called pleas to the jurisdiction *ratione materia et personæ*, which were filed irregularly after the case had been put at issue, and after the master's report and exceptions had been filed thereto. The certificate of counsel is not attached to these documents, and they had no proper place in the files of the court. At the same time it is to be noticed that the right to file new or amended pleadings after the pleadings have been regularly made under the rules is a matter within the discretion of the chancellor and not subject to review. Another serious objection to these alleged pleas is that, in so far as they attack the jurisdiction of the court in the original suit in the circuit court in which Mrs. Fisher recovered a judgment against the city school board, and which is the basis of this creditors' bill, it seems clear to us that the pleas are objectionable. Mattingly *vs.* Nye, 8 Wall., 370.

The 9th assignment of error does not appear to be based on any affirmative ruling of the court below. It appears that leave was asked to file a plea to the jurisdiction and an order to show cause issued, but no ruling made in the premises.

The 10th assignment is to the effect that it was error not to have allowed the plea of prescription made in the answer of the defendant, for, as it is claimed, the cause of action arose in 1873 and subsequent years, the last year being 1879, and the same was prescribed by ten years. In the case of Gasquet *vs.* The Board of City School Directors, 45 An., 342, the supreme court of Louisiana, in passing on a plea of prescription in favor of the school board, said:

"We think the pleas of prescription are not well founded. Act 36 of 1873 makes it very clear that the claims evidenced by these certificates were not payable absolutely or at any particular time.

They are payable only out of the revenues of the years
191 for which they are issued, and only when said revenues are collected and in the manner therein provided; and the act further declared that 'no writ of *fi. fa.* or mandamus shall lie for seizure of any school moneys, or to direct or enforce its paying out otherwise than in the manner and sequence required in this act.'

This law formed a part of the contracts out of which the claims arose and deprived the claimants of any legal remedy to enforce payment except out of particular revenues when actually collected and covered into the treasury.

The case is very much stronger and clearer than that of King Bridge Co. *vs.* Otoe Co., 124 U. S., 459, in which the Supreme Court of the United States held that county warrants, payable only when there are funds in the treasury applicable thereto, are not actionable until the money for its payment is collected, and, therefore, not subject to the statute of limitations except from the same time."

The principles here declared are in many respects applicable to the case in hand.

The judgments sought to be enforced in this case were rendered since 1890 and the school certificates sued on are in judgments, and this suit is brought within ten years from the rendition of the judgments. The position of the city being that of trustee, her possession of the funds in question is not as owner, and prescription does not, as a general proposition, run in favor of the trustee as long as the trust relation continues. In equity the trustee should never be allowed to acquire trust funds by limitation. Daniell's Ch., 642; Oliver *vs.* Piatt, 3 How., 411.

The 11th assignment seeks to raise again the question of jurisdiction of the circuit court in the original action in which Mrs. Fisher obtained a judgment, and needs no further consideration.

The 12th assignment is that the court erred in holding the school taxes to be a trust fund in the hands of the city. The city was collecting the school taxes for the school board and therein acting as agent, and a trust naturally resulted.

The 13th assignment of error denies the right of the complainants to claim an accounting from the city of New Orleans. This
192 objection goes to the right of the complainants to maintain this suit for an accounting which to us seems so plain that no argument is needed to sustain it.

The 14th and last assignment of error is as follows:

"It was error to order the whole fund ascertained by the master to be paid over to complainant and intervenors in this suit, because if said fund is a trust fund, it is held for the benefit of all interested in said fund, and the only part that should be paid to complainant and intervenors is their proportion of same; in other words, it was error for the court to ignore the rights of other certificate-holders not party to this suit, and who were not notified by publication, or cited herein. And to ascertain what proportion of the fund should go to the complainant and intervenors herein, a re-reference to the master is necessary."

To this, all that is necessary to answer is that the suit is one brought for the benefit of complainants and others similarly situated; numerous complainants who desire to participate in the expenses of suit have already intervened, and if there are others who desire to come in before the final distribution of any funds realized, the circuit court will be open to them.

John Fisher, natural tutor, etc., and others, complainants in the court below, assign as error on their cross-appeal, first: that a new trial having been refused after the term in which decree was rendered, the circuit court was without jurisdiction under equity rule No. 88 and other equity rules governing the practice of the court, to amend its decree; second: that, under the equity jurisprudence, as well as under the Louisiana law, complainant and intervenors were entitled to a decree carrying interest as was allowed by the original decree.

The record shows that after the decree entered at the November term and during that term a petition for rehearing was filed, sub-

mitted and taken under advisement; that pending decision of the matter the November term of the court was adjourned and the following April term commenced. As we understand the practice, the application for rehearing submitted and taken under advisement hindered the decree of the court as entered from becoming
193 final, by the adjournment of the court, and it was competent for the judge at the following term of court to grant a full rehearing or otherwise modify his decree. Goddard *vs.* Ordway, 101 U. S., 745.

Whether interest should be allowed upon the amounts decreed against the city as directed in the original decree presents a more important question. The master found that the school taxes and interest on school taxes collected by the city of New Orleans for the years prior to 1879 and not paid over to the school board and now owing, amounted to the sum of $71,938.78, and of this sum the lower court gave originally a decree with 5 % interest on $71,139.60, from January 24, 1881, and on $799.18 from May 11, 1896, until paid. The master's report is silent as to the dates on which the city of New Orleans had collected the several sums found due and owing by it to the school board, but the exhibits filed with the report show that all of the sum of $71,139.60 was collected by the city prior to January 24, 1881, and the sum of $799.18 prior to May 8, 1897. It is not disputed that the amounts collected by the city as interest on delinquent school taxes has been used and appropriated by the city in its own affairs. The general rule in equity is that a trustee who employs trust funds to his own advantage shall be charged interest. Perry on Trusts, sec. 468; Adams' Equity Mar., p. 54.

The Civil Code of Louisiana, section 3015, is as follows:

"The attorney is answerable for the interest of any sum of money he has employed to his own use, from the time he has so employed it; and for that of any sum remaining in his hands from the day he becomes a defaulter by delaying to pay it over."

It thus appears that by general equity principles and by the Louisiana Civil Code, the City of New Orleans, as trustee, should be charged with interest. If the case is one showing that the City of New Orleans was a gross delinquent and an unfaithful trustee, equity would further require that compound interest should be allowed upon all sums collected and retained by it with six months' rests.

The interest claimed by the exception filed to the master's
194 report and allowed in the original decree, and now claimed upon appeal, is five per cent., the legal rate of interest fixed in Louisiana on all debts from the time they become due, unless otherwise stipulated. The decree appealed from, as amended by the judge *ex propria motu*, when the petition for rehearing was refused, allows no interest prior to the date of the decree. The amendment appears to have been suggested by the master's report to the effect that at the date thereof the city then owed the school board for taxes collected and for interest on taxes collected $71,938.78. An inspection of the report and the exhibit shows, however, that the

moneys so found due have been for a long time in the hands of the city of New Orleans. That the master's report allowed no interest on these sums so held by the city was a specific ground of exception on the part of complainants to the master's report, and exceptors said: "That your exceptors are entitled to interest with an annual rest according to the rules and principles of equity and jurisprudence; but they will content themselves with simple interest, reserving their rights to a further account when found necessary."

Under all the circumstances, as shown by the record, we are of opinion that an allowance of five per cent. interest on the amounts collected by the city prior to January 24, 1881, and held and employed in the city's affairs since that date, would be just and equitable, and that the decree, as originally rendered by the circuit court, was correct except as to interest on the sum of $799.18, which was only allowable from May 9, 1897, instead of from May 11, 1896.

The decree appealed from is amended so as to allow five per cent. interest on the sum of $71,131.60 from January 24, 1881, and on the sum of $799.18 from May 8, 1897, and as amended, the said decree is affirmed with costs against the City of New Orleans.

195 *Clerk's Certificate.*

United States Circuit Court of Appeals for the Fifth Circuit.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 196 pages, numbered from *a* to 195, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court, in the case of The City of New Orleans, appellant, *vs.* John Fisher, tutor, etc., *et al.*, appellees, No. 747, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 13th day of June, A. D. 1899.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

196 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Being informed that there is now pending before you a suit in which The City of New Orleans is appellant and John Fisher, tutor, &c., *et al.* are appellees, on appeal and cross-appeal, which suit was removed into the said circuit court of appeals by virtue of appeals from the circuit court of the United States for the eastern district of

Louisiana, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by
the said circuit court of appeals and removed into the Su-
197 preme Court of the United States, do hereby command you
that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

198 [Endorsed:] Supreme Court of the United States, October term, 1898. No. 747. The City of New Orleans *vs.* John Fisher, tutor, &c., *et al.* Writ of certiorari. Received June 1, 1899. J. M. McKee, cl'k.

United States Circuit Court of Appeals, Fifth Circuit.

In obedience to the command of the within writ and by direction of the judges of the United States circuit court of appeals for the fifth circuit, I, J. M. McKee, clerk of said court, do as a return to said writ transmit herewith to the honorable the Supreme Court of the United States a true, full, and perfect transcript of the record, with all proceedings had, in the cause of The City of New Orleans, appellant, *vs.* John Fisher, tutor, &c., *et al.*, appellees, as fully and completely as the same remains of record and on file in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, in the city of New Orleans, on this the 29th day of June, A. D. 1899.

(Seal United States Circuit Court of Appeals, Fifth Circuit.)

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

Endorsed on cover: File No., 17,391. U. S. C. C. of appeals, 5th circuit. Term No., 281. The City of New Orleans, petitioner, *vs.* John Fisher, tutor, &c., *et al.* Writ of certiorari and return. Filed July 3, 1899.

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PETITION FOR WRIT OF CERTIORARI.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

SUPREME COURT, U.S.
FILED
MAY 1 1899
JAMES H. McKENNEY
CLERK.

EX PARTE THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, CREATED BY THE LAWS OF THE STATE OF LOUISIANA, PETITIONER.

PETITION FOR WRIT OF CERTIORARI, REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT TO CERTIFY TO THE SUPREME COURT, FOR ITS REVIEW AND DETERMINATION, THE CASE OF THE CITY OF NEW ORLEANS, APPELLANT, VS. JOHN FISHER, TUTOR, ETC., ET AL., APPELLEES.

SAMUEL L. GILMORE,
City Attorney.
JAMES J. McLOUGHLIN,
Assistant City Attorney.
BRANCH K. MILLER,
Solicitors for Petitioner.

Filed _____ 1899.

_____
Clerk.

A. W. Hyatt Stat'y Mfg Co., N. O.—60,515.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1898.

EX PARTE THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, CREATED BY THE LAWS OF THE STATE OF LOUISIANA, PETITIONER.

PETITION FOR WRIT OF CERTIORARI, REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT TO CERTIFY TO THE SUPREME COURT, FOR ITS REVIEW AND DETERMINATION, THE CASE OF THE CITY OF NEW ORLEANS, APPELLANT, VS. JOHN FISHER, TUTOR, ETC., ET AL., APPELLEES.

To the Honorable Supreme Court of the United States:

The petition of the city of New Orleans, a municipal corporation, created by act of the General Assembly of the State of Louisiana, No. 45, of its session of the year 1896, respectfully shows:

1st. That your petitioner is a municipal corporation, created by legislative act, as aforesaid, its government duly organized, and exercising functions and powers, and discharging the duties, thereunder.

2d. That on May 11th, 1896, Mrs. M. M. Fisher filed, in the Circuit Court of the United States for the Eastern District of Louisiana, her bill against your petitioner, and the School Board of the city of New Orleans, setting forth that Oratrix had obtained a judgment in the Circuit Court, against the said Board of School Directors, for a sum in excess of ten thousand dollars; that the said Oratrix had likewise obtained two other judgments against the said Board, in the Civil District Court for the parish of Orleans, aggregating in amount many thousands of dollars; that all of said judgments were final, and were made payable out of school taxes levied by the city of New Orleans, for years prior to 1879; that the said taxes out of which said judgments should have been payable constituted a trust fund, levied by your petitioner for the purpose of paying the expenses of the public schools of the city; that the latter had failed to collect the said taxes punc-

tually, and that it was through her fault and negligence that the same remained uncollected, and that by reason of her neglect she had become liable for the amount thereof uncollected; that the same carried interest at the rate of 10 per cent. per annum, and that your petitioner has never paid to the School Board any of the said interest, but had misapplied and diverted it "to other unlawful purposes;" that the School Board had created the obligations (upon which said judgments had been rendered), "by virtue of contracts which were legally entered into," and that, "Oratrix was protected by the constitution of the United States from any impairment of her contract;" that in violation of this constitutional right, the State of Louisiana had adopted Act 82, at the session of its General Assembly of 1884, which directed that the property of delinquent tax payers should be sold for what it would bring, and that all taxes due thereon, by virtue of the said sale, should be cancelled; that under this statute, the city allowed the property upon which the school taxes were due, to be sold for taxes due the state, and had caused the city taxes, including the school taxes, to be cancelled; that she was thus guilty, first, as a delinquent trustee, for not having enforced the collection of said taxes, and, second, for having failed to protect the interest of Oratrix at the said state tax sale; that the cancellation thus made amounted to many thousands of dollars."

That the city, at various times, passed ordinances, cancelling and annulling the said taxes, and remitting the interest thereon; that Oratrix was "unable to give the exact amount of each kind of violation of her obligations by the trustee, and that it is absolutely necessary to make the city of New Orleans account for the various amounts which had been lost to Oratrix through the unfairness of the said trustee."

3d. That the Board of School Directors, to whom the city should account, had refused to demand such an account, and would continue to do so, and Oratrix would be left without a remedy; that the fund administered by the city at the date of the filing of the bill seemed to be insufficient to satisfy the demands of all creditors who were entitled to be paid out of the same; that the judgments of Oratrix were made directly payable out of school taxes levied prior to 1879, and that she had an equitable lien thereagainst, enforceable before a court of equity; that the certificates held by Oratrix, which were merged into judgments, had been under the law received by the city directly in payment for school taxes, without the intervention of the Board of School Directors, and that the bill was brought against the city and the Board of School Directors for an account.

4th. By supplemental bill, filed August 4th, 1896, it was set up, that the city had, at various times, seized for taxes, for the years during which the claims for Oratrix arose, a number of houses and

lots, and had purchased the same in satisfaction of the taxes due, and that, "a resulting trust had, under the law, followed the property, and that Oratrix was entitled to have the value of the said real estate realized upon, and the rents accounted for, by the city;" that Oratrix was unable to give an exact statement of the property, but averred that the same largely exceeded thirty thousand dollars in value; that the city allowed the property to go to waste; that Oratrix had a statutory lien upon all of the same, and was entitled to the appointment of a receiver to take charge of it, and realize upon the same, under order of court.

5th. The city demurred generally to the original and supplemental bills, on August 28th, 1896, which demurrers, after argument, on March 21st, 1897, were overruled. (R., pp. 5-6-7-10.)

6th. On March 12th, 1897, the city answered (R., pp. 11, *et seq.*), setting up:

(A) Admitting the rendition of the judgment mentioned in complainant's original bill, likewise their finality.

(B) A denial that the school taxes out of which the judgments were payable were a trust fund levied by the city for the purpose of paying school expenses.

(C) A denial that it had ever failed to collect the taxes punctually, or that any of the same remained uncollected, or, if such latter were not the fact, that this was not by reason of any negligence on the part of defendant; and a further denial that the city was liable for any of the uncollected taxes, if any such there were.

(D) An admission that the city had never paid to the School Board, any interest which she may have collected on any such taxes, but a denial that such interest was the property of or due to, the School Board; a denial that she ever misapplied or diverted such interest to any unlawful purposes; concluding with the averment that by express provisions of law, all interest collected on delinquent taxes, was specially set aside for certain purposes, and could not by her be used for school purposes, or for any other purpose than that required by law.

(E) A denial that the School Board created the obligations against school taxes, set out in the bill, by virtue of any contract entered into, with the further denial that Oratrix had any right to invoke any protection of the federal constitution.

(F) A denial that Act 82, of 1884, violated any constitutional rights of Oratrix; that said act was within legislative authority.

(G) A denial that the city allowed any property on which school taxes were due to be sold for taxes; also, that she caused any school taxes to be cancelled; she denied that she was guilty as a delinquent trustee, and that she was ever a trustee in the premises, or failed to enforce the collection of any taxes of which it was her duty to enforce;

also, that it was her duty to protect the interests of Oratrix, if she had any, at the tax sales described, with another denial that Oratrix had such interests.

The answer contained, besides these, additional special denials of all the facts set up in the bill, particularly that there was any privity between the city and the School Board, or between complainant and the former.

(H) It was further set up, in defense, that if any cause of action for an accounting by the defendant ever existed in favor of the School Board, the same was effective and executory in 1880, and became actionable in that year, and the years following 1873, up to 1879, inclusive; that the said cause of action, if it existed, was personal to the School Board, and could only be exercised or availed of by the School Board, which action was prescribed by the lapse of ten years from and after the lapse of each of said years.

(I) There was further denial, that there was any fund at the date of the filing of the bill, or at any other time, administered by the city, and that complainant had any equitable lien enforceable against the city of New Orleans; that the certificates of plaintiff were ever received by the city, in payment of school taxes, without the intervention of the School Board, or that the former sold for taxes, and purchased in settlement thereof, any houses and lots, or that any school taxes were due upon the same, if the other averments of the bill were true, or that complainant had the resulting trust claimed by her bill, or that she was entitled to the value of any such real estate or that the property so purchased by the city was of the value of thirty thousand dollars, or any part thereof, were all in each instance expressly denied.

7th. On different dates thereafter, interventions were filed by F. J. Gasquet, Jose Venta, Mary Quinlan and Jean Pomes, setting up claims generally similar in character to those made by complainant's bill.

8th. The whole matter having been referred to a master, the latter, on May 22d, 1897, filed his report (R., pp. 25, *et seq.*), under the order of reference, which directed him (R., pp. 17 and 21), to take a full, true, fair and perfect account of,

All the funds, principal and interest, received by the city for school taxes levied for the years 1871 to 1878, inclusive; he reported these to be,

(a) In the principal of said taxes collected and not paid over, amounting to..... $23,180 05

(b) In interest collected upon the same taxes, up to January 1st, 1897, to which the School Board would be entitled. 48,758 75

Making a total of..... $71,938 80

which said sum, the report declared, was owing by the city to the School Board.

The report further set out:

(c) That complainant abandoned any proof to show that the city owed anything on account of property purchased for taxes.

(d) That the city owed nothing on account of interest illegally remitted, but could be only held for the amount of interest she actually collected.

(e) That complainant and intervenors had proved their claims against the fund mentioned, by judgments rendered in their favor, as follows:

M. M. Fisher	$11,094 87
"	8,802 39
"	5,864 64
T. J. Gasquet	57,059 69
Jose Venta	21,297 72

9th. This report was excepted to by the city (R., pp. 36-37), on the following grounds:

That the master, under the reference, had no authority to report upon any question of law, and his conclusion that the interest upon taxes was part of the taxes, and belonged to the party to whom the taxes belonged, was averred to be erroneous, and excepted to; the conclusion of the master that the taxes collected from 1871 to 1878 were due by the city to the School Board was also excepted to.

10th. On June 29th, 1897, your petitioner filed what was termed an "exception to the jurisdiction of the court, *ratione materiæ et personæ*," to the effect that the bill contained no averment that the suit could have been maintained by the assignors of the claims sued upon by the complainant, in the suit which formed the basis of the present action; on November 29th, 1897, the exceptions to the master's report was fixed for trial on December 4th; they were not tried on that day, nor on December 11th, to which date the matter was continued, and on that day, on motion of the city, there was a further continuance to December 17th; on December 20th, 1897, the city filed a plea in abatement (R., pp. 49, *et seq.*), to the effect that Mrs. M. M. Fisher, the complainant, was a citizen of the State of Louisiana, residing in the city of New Orleans, at No. 2335 Chippewa street; that said plaintiff and defendant were both citizens of the State of Louisiana, and that by reason thereof the Circuit Court was without jurisdiction.

The plea further recited, that at the time plaintiff instituted her suit in the Circuit Court, in which she obtained one of the judgments described in her bill, she was a citizen of Louisiana, and had remained such continuously ever since; and was, on the said date, December 20th, 1897, a citizen of such state; that defendant did not discover these facts until after its exceptions had been filed to the

master's report; that defendant had made due and diligent search to discover the facts, through the Secretary of State, and through the Consul General of the United States, in Havana, Cuba; that in bringing in the Circuit Court her said original suit, upon which she had already obtained judgment, being No. 12,060 of the docket, and in filing the present suit, complainant's representation that she was a subject of the Kingdom of Spain, was for the purpose of showing jurisdiction in the Circuit Court, by a fraud upon that court; that by inducing the defendant to demur and answer, the latter being at the time ignorant of the true facts, complainant was practicing and had practiced a fraud upon the Circuit Court, to obtain its jurisdiction; that defendant was mislead by the said fraud and misrepresentation, and that equity required that it be permitted to withdraw, or to treat as withdrawn, the demurrer and answers filed by it, and then and there to file its plea to the jurisdiction; upon objection being made by the complainant and intervenors to the filing of said pleas, and after hearing counsel of all parties, the court refused the application to file the same, as the order states, "at this time."

In the meanwhile, on December 13th, 1897, prior to the tender of the plea to the jurisdiction just mentioned, complainant obtained a rule to show, returnable on December 17th, why "two papers filed in this cause, and styled 'exception to the jurisdiction of the court, *ratione materiæ et personæ*, and plea in abatement,' should not be stricken from the files of the court."

On December 20th, 1897, the motion was granted, and the court ordered the documents to be taken from the files.

On December 21st, 1898, the court rendered its decree, adjudging that the city of New Orleans, as trustee of the special school taxes levied and collected for the years 1871 to 1878, inclusive, be condemned to pay plaintiff and intervenors the said taxes received and collected by her, as follows: $71,938 78, with five per cent per annum interest on $71,139 60, from January 24th, 1881, and on $799 18, from May 11th, 1896, until paid; this decree was afterwards amended by order of the court, April 28th, 1898, so as to allow interest on the amount recovered, to-wit, $71,139 60, from February 21st, 1898, the date of the decree, instead of from January 24th, 1881; the amount of this judgment to be divided and distributed pro rata, up to their full claims, to the intervenors already named, and to other persons who had appeared by way of intervention, in the sums ascertained to be due to them respectively.

11th. That on March 2d, 1898, a petition was filed by John Blackadder, which declared him to be a citizen of the State of Louisiana, setting forth that Mary Blackadder, the wife of John Fisher (being the same Mrs. M. M. Fisher, complainant in the suit mentioned), had departed this life on February 26th, 1898, leaving, as the issue of her

marriage with John Fisher, four minor children, residing in the said city; that the said Fisher was then absent from the said city, in the Island of Cuba; that during his absence, and until such time as he might return, and be confirmed by the probate court as the natural tutor of his minor children, that petitioner desired to represent his said grandchildren in the prosecution of the suit of Mrs. M. M. Fisher and her husband against the city of New Orleans, wherein a decree had been rendered in their favor for an accounting, under number 12,516 of the docket of the court; the petition concluded with a prayer that Blackadder be appointed *prochein ami* of the said minor children, with power to represent them, and prosecute the suit, until such time as their father might return to the city of New Orleans, and qualify and be confirmed as their natural tutor; the court made an order in accordance with the prayer of the petition, appointing Blackadder therein for purposes prayed for.

12th. On March 5th, 1898, the city of New Orleans, by motion, which, after suggesting the death of Mrs. M. M. Fisher, the complainant, and the abatement of the suit by reason thereof, and its desire to make application for a rehearing, but its inability to do so until proper parties had been named to represent the complainant, obtained an order for the filing of the motion, for the giving of notice to the complainant, and a stay of further proceedings in the case, until the further order of the court.

On March 5th, on the suggestion that Blackadder had been appointed *prochein ami* of the minors Fisher, and that they had been made parties to the suit, and that in consequence thereof the order staying proceedings should be set aside, obtained an order for the city to show cause why the said order should not be rescinded.

On April 22d, 1898, the court made an order, rescinding the stay order of March 5th; on the same date, John Fisher, by motion, on the suggestion that he had been appointed and qualified as natural tutor of his minor children, obtained an order that in that capacity he be made party complainant, "to these proceedings;" acompanying the motion was a copy of his letters of tutorship, issued by the Civil District Court for the parish of Orleans.

13th. That on April 23d, 1898, both the city of New Orleans and the School Board presented to the Circuit Court an application for a rehearing, assigning seventeen grounds therefor, each setting out specifically what was averred to be an error to their prejudice; among these were particularly the following:

(a) That the evidence did not warrant the allowance of interest upon $71,139 60 from January 21st, 1881, because the master's report did not allow such interest, but stated that such amount was due from the filing of his report, to-wit: May 22d, 1897; that, hence, it was error to allow interest from January 24th, 1881; that if this sum

were due at all, it was only due from the time the master said it was so due, and this was May 22d, 1897; that the allowance of such interest for a period of nearly seventeen years, prior to the making of the master's report, was an error.

(b) That interest was improperly allowed in favor of Mary Quinlan, upon her judgment of $5,373 78, for the reason that her judgment allowed her no interest.

(c) That there was error in decreeing the city liable for any part of the taxes of 1881, for the reason that the evidence showed that no part of the claim sued upon arose during the year 1871, and further, that the act of the legislature, which directed the city to impose a special tax of 1¼ per cent., was passed in the year 1873, and, therefore, could not affect the taxes of 1871; that complainant claimed no share in the taxes of that year, or any interest thereon, and in allowing her the same, the court awarded her more than she demanded; that the amount awarded, on account of the taxes of 1871, was $7,821 17, and the delinquent interest thereon, $9,332 81, making a total allowance of $17,153 98 erroneously awarded by the decree.

(d) That the court in error included in its decree the sum of $11,933 27, which the master's report declared was the amount of discount allowed by the city to the tax payer for prepayment of school taxes; this amount the city, as stated, never actually collected, while the bill only claims an accounting of such taxes and interest as the city, in fact, did collect, and in this respect the decree has allowed more than was claimed by the bill.

(e) The court was in error in allowing as part of the sum for which its decree was rendered the sum of $1,816 55, as collected, for the year 1874, and not paid, or accounted for, to the School Board; this for the reason that by the testimony offered by complainant herself, it was shown that the city had paid over to the School Board all that she had collected for the said year 1874, and in no event should she be held responsible, under the prayer of complainant, for any sum she did not collect.

(f) That the court erred in approving the finding of the master, that the interest or penalty on delinquent school taxes formed part of the taxes themselves, and should have been turned over to the School Board; that in any event, if the court were correct in such conclusion, it should apply only to such taxes, the principal and interest of which the city had never paid or accounted for to the School Board, and not taxes the principal and interest of which she had already paid to the said Board, years ago; that from the master's report it appears that only $23,108 23 of the principal of the school taxes collected by the city had never been paid over to the Board, and it is only on this sum, if any at all, that the city would be liable for the interest or penalties.

(g) That the court was in error in ordering to be stricken from the record the two documents filed June 29th and July 1st, 1897, for the reason that they remained on the files from June to December, without any objection on the part of complainant, and it was then too late, on December 20th, to raise any objection thereto; that the most that could have been required of defendant was to amend the plea to the jurisdiction, by affixing the solicitor's certificate.

(h) That it was error for the court to refuse to allow defendant to file the affidavits and plea to the jurisdiction, *ratione personæ*, December 20th, 1897, for the reason that under the law such a plea can be filed at any time; furthermore, as the city's plea and affidavit set up a charge of fraud against the complainant, in equity, such a charge having been made, and supported by affidavit, it was the duty of the court to entertain the plea.

(i) That the court erred in not sustaining the plea of prescription made in the answers of defendant, for, as the complainant's cause of action arose in 1873, and subsequent years, the last year being 1879, the same was barred and extinguished by the prescription of ten years.

(j) That the court erroneously held that the school taxes, out of which complainant's judgments were made payable, were a trust fund, levied by the city of New Orleans, for the purpose of paying the expenses of the public schools of the said city; that the court was in error in holding that there was any privity between the city and complainant, and that she had the right to claim an accounting from the former; that the only person who could call for the same was the School Board, and the court erred in permitting any other person so to do.

(k) That the court was in error in ordering the whole fund ascertained by the master to be paid over to complainant and intervenors in this suit, because if such fund is a trust fund, it is held for the benefit of all interested in the same, and that complainant and intervenors would have no right to any more than their just proportion of the same; that there are other holders of school certificates, not parties to this suit, who were not notified by publication, or cited, and that to ascertain what proportion of the fund complainant and intervenors were entitled to receive, a reference to the master was necessary.

14th. That on April 28th, application for a rehearing was refused, whereupon the case was subsequently carried by appeal to the Court of Appeals for the Fifth Circuit; along with the motion of appeal, was filed the following assignment of errors:

I.

It was error for the court to decree judgment against the city for any part of the taxes of 1871, for the reason that the evidence shows

that no part of the complainant's claims arose during the year 1871, and further, that the act of the legislature which directed the city to impose a special tax of one-fourth per cent. was passed in the year 1873; therefore could not affect the taxes of 1871.

Furthermore, it is error for the court to allow a decree against the city for taxes of 1871, for the reason that the complainant does not claim any share in the taxes of 1871, or any interest thereon, either in her original or supplemental bill, and it was error for the court to allow her more than she claimed. Consequently the amount declared due out of the taxes of 1871, to-wit, seven thousand eight hundred and twenty-one 17-100 dollars, and the delinquent interest of taxes of 1871, nine thousand three hundred and thirty-two 81-100 dollars, were allowed in error, and should be deducted.

II.

This being a suit for an accounting, the court erred in giving judgment against the city for money that she never collected, in that the judgment includes the sum of eleven thousand, nine hundred and thirty-three 27-100 dollars, which the master's report states is a discount allowed by the city to the tax payer for payment of school taxes, and as the bill only claims and asks that the city be compelled to pay over the actual amount of cash collected, and as this money was never collected, it was error for the court to order it paid over. This being only a suit for an accounting, judgment, cannot be had in the bill for anything but actual money collected.

III.

The evidence shows that the full amount of money collected for 1874 school taxes was turned over to the School Board (see testimony of Clark Steen, and his report, offered in evidence by complainant, R., p. 83) and such being the case, it is urged that it was error for the court to make the city pay over any more money out of the taxes of 1874, the city having already paid over all that she owes on that year. Such being the case, the amount of $10,816 59 and $209 50, proportion of interest on school taxes for 1873, and the proper proportion of principal for school taxes for 1874 (to ascertain the amount of which a reference to the master is necessary), are not due to the School Board. While it is true that all back taxes prior to 1879 are lumped into one fund, we urge that, in calling for an accounting, it is sufficient for the city to show, in order to be discharged as far as the taxes of any particular year are concerned, that she has paid over the full amount of taxes due the School Board for that year, and having done this, with the taxes for 1874, it is error for the court to order her to turn over any more of the taxes for that year.

IV.

Complainant's judgment, No. 12,060, and her other judgments, are law judgments, and she has ample remedy in law; hence, no right to invoke the equity side of the court.

V.

Complainant had no right to sue the city of New Orleans, because her judgments are against the School Board only, and she does not allege that the city owes the School Board anything.

VI.

The evidence shows that in suit No. 12,060 the city was garnisheed on July 12th, 1894, under a *fi. fa.*, and answered, under oath, that she had one thousand eight hundred and ninety-three and 9-100 dollars to the credit of the school fund prior to 1879 on that date, and having paid that amount over to Mrs. Fisher, under her judgment, it was error for the court not to hold that said payment to and acceptance by Mrs. Fisher, complainant herein, estopped her from traversing said garnishment, as she is doing by this proceeding, and the court should have held such payment and acceptance as an estoppel and *res judicata* concerning all collections made up to July 12th, 1894.

VII.

The court erred in approving the finding of the master that the interest or penalty on delinquent taxes formed a part of the taxes, and should be turned over to the Board. But even though this were correct (which, of course, is not admitted), the court erred in ordering the city to pay over the penalty on taxes which she had already paid over. In any event, she should not be compelled to pay over the penalty on any taxes, except on those taxes which are still in her possession. In other words, the master's report shows twenty-three thousand one hundred and eight 3-100 dollars of principal, and that only the penalties on this twenty-three thousand one hundred and eight 3-100 dollars should be turned over, and not the penalties on the taxes that were turned over to the Board years ago.

VIII.

It was error for the court to have stricken from the record the two documents filed June 29th, and July 1st, 1897, for the reason that they remained on the files, from June to December, without any objection on the part of the complainant, and it was too late then for her to make the objection she did on December 20th, 1897. The most that should have been required of defendants was to amend the plea to the jurisdiction by affixing the solicitor's certificate.

IX.

It was error for the court to refuse to allow defendant to file affidavit and plea to the jurisdiction, *ratione personæ*, December 20th, 1897, for the reason, that under the law, such a plea can be filed at any time; furthermore, as the city's plea and affidavit set up a charge of fraud against the complainant, in equity, such charge having been made and supported by affidavit, it was the duty of the court to entertain the plea, to let the fraud be proven.

X.

It was error for the court not to have allowed the plea of prescription made in the answers of defendants, for as the complainant's cause of action arose in 1873 and subsequent years, the last year being 1879, the same was prescribed by the prescription of ten years, and consequently her suit would have been dismissed on the consideration of this plea.

XI.

Her judgment in suit No. 12,060 is based upon choses in action, not suable in this court, as there is no allegation that the original assignors could sue in this court; therefore the court had no jurisdiction *ratione materiæ*, and it was error for the court to assume jurisdiction herein.

XII.

The court erred in holding that the school taxes out of which said judgments have been made payable, is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public schools of said city.

XIII.

The court erred in holding that there was any privity between the city of New Orleans and Mrs. Fisher, and in holding that she has any right to claim an accounting from the city of New Orleans. Defendant city avers and declares, that the only person who could call for such accounting is the said School Board, one of the defendants herein, and the court erred in permitting any other person than the said School Board to call for such accounting.

XIV.

It was error to order the whole fund ascertained by the master, to be paid over to the complainant and intervenors in this suit, because if said fund is a trust fund, it is held for the benefit of all interested in such fund, and the only part that should be paid to complainant and intervenors is their proportion of the same; in other words, it was error for the court to ignore the rights of other certificate hold-

ers not parties to the suit, and who were not notified by publication, or cited herein. And to ascertain what proportion of the fund should go to complainant and intervenors herein, a reference to the master is necessary.

Petitioner sets out at length in this petition the grounds assigned for a rehearing in the Circuit Court, and those set forth in the said assignment of errors, and prays that the same be taken together as an assignment of errors, to serve for this application, and for the hearing and for all other purposes of this cause, should the writ of *certiorari* hereby applied for be granted.

15. That shortly after the said decree of the Circuit Court became final and executory, by the lapse of time, during which an appeal could be taken by defendant from the said decree, with supersedeas, complainant and intervenors instituted in the Circuit Court a suit for a mandamus against the Board of Liquidation of the City Debt, a corporation created by act of the General Assembly, No. 133, of 1880, which said act, subsequently amended by Acts 67, of 1884, and 110 and 128, of 1890, charged by said act with the exclusive direction and control of all matters relating to the bonded and judgment debt of the city of New Orleans; that said suit was founded upon the averment principally that, under the aforesaid legislative acts, the petitioners therein were entitled to be paid the amount of the said decree of the Circuit Court out of funds derived from the sale of bonds issued under said Act 110, of 1890, and the amendment to the constitution of the state, which the said act was designed to carry into effect; that the said suit for a mandamus sought to obtain satisfaction, by payment and discharge, of the said decree of the Circuit Court, of the amount for which the same was rendered, to-wit: $71,139 60 with 5 per cent. interest per annum thereon from Feburuary 24th, 1898, and $799 18, with like interest, from May 11th, 1896; that there was judgment in said suit in favor of plaintiffs and against defendant making the mandamus peremptory, whereupon it was carried by writ of error to the Court of Appeals, all of which will fully appear by reference to copies of the petition, answer and judgment in said cause, filed herewith, and marked "Exhibit A"; that the said suit was an acquiescence in the decree of the said Circuit Court, and an affirmance of the correctness thereof, and deprived complainant of any right to urge in the Court of Appeals, on the cross-appeal which was taken by them, after the record of the appeal of defendant had been lodged in the said Circuit Court of Appeals; that by invoking the power of the court to enforce the said judgment, complainant was estopped to urge any error therein in any respect; that the present suit of Mrs. M. M. Fisher, et al. vs. the city of New Orleans, and that of John Fisher, Tutor, etc., et al. vs. Board of Liquidation of the City Debt, which was the title of the suit by

which said mandamus was sought, were both argued and submitted in the said Court of Appeals on the same day, and that in consequence thereof, the said court knew judicially all the facts and issues involved in each case, and hence, was cognizant that the complainant and intervenors in the present case had acquiesced, as aforesaid, in the said decree of the Circuit Court; all as will more fully appear by what is set out hereinafter.

16th. That this cause was heard in the Court of Appeals on December 13th, 1898, and on March 14th, 1899, the said court rendered an opinion and entered a decree overruling all of the defenses set up by defendant, and deciding against defendant all the questions raised by its assignment of errors, and entered a decree amending the decree of the Circuit Court, by allowing interest on $71,139 60 of the total sum thereby awarded from January 24th, 1881, instead of from February 21st, 1898, as allowed by the Circuit Court, and in other respects affirming the said decree.

17th. That petitioner made timely application to the said Court of Appeals for a rehearing, assigning therefor the following grounds, in support thereof:

"That since their appeal was filed in this cause, and before the cross-appeal was taken by the defendants in error herein, the said defendants in error brought a proceeding in the Circuit Court of the United States of the Fifth Circuit and Eastern District of Louisiana, entitled United States *ex rel.* John Fisher, Tutor etc., vs. Board of Liquidation, No. 12,740 of the docket of said Circuit Court, wherein said Fisher, *et a/s.* admitted, under oath, that the judgment obtained in this proceeding, No. 12,516 of the docket of said court, for $71,938 74, with legal interest from February 21st, 1898, was final, and they ask said court, in said proceeding No. 12,740, to grant them a mandamus, directed against the Board of Liquidation, for payment of this judgment.

"Your petitioners represent that this is newly discovered evidence arising since the appeal herein was taken to this Honorable Court, and the whole record of the said suit No. 12,740 is now lodged in the Honorable Court of Appeals as No. 746 of the docket thereof, and your petitioners pray leave to have the same filed herein, and considered in connection with and as a part of this petition for rehearing.

"Now, your petitioners show that said suit No. 12,470 and said prayer for mandamus constitute a full and final acquiescence in the judgment and decree rendered in the instant case, No. 747 of this court, and No. 12,516 of the United States Circuit Court; and that by their action in taking said proceeding, said defendants in error are estopped and precluded from asking any amendment of said judgment which might increase the amount of the same.

"Petitioners further show that the court erred in refusing to take

notice of the fact which is apparent on the face of the record, to-wit: That Mrs. M. M. Fisher is not a subject of Spain, but on the contrary is a citizen of Louisiana.

"Petitioners show that the judgment in this case is solely in favor of Mrs. M. M. Fisher, and that her death certificate, which is found on page 129 of the transcript, shows that she was a native of Virginia, and had lived in New Orleans for thirty-eight years prior to her death. And your petitioners show that the affidavit of solicitor for Mrs. Fisher, which is found on page 141 of the transcript, sets forth as a fact that the statement that she and her husband are Spanish subjects, was wrong, and that, on the contrary, he is a British subject, and had never been a Spaniard. And this statement relative to John Fisher is corroborated by his own affidavit printed on page 142 of the transcript. Consequently, petitioner believes that it was error for the court not to have taken notice of these facts, which are apparent on the face of the record, and also of the fact that these statements were made after the decree had been rendered by the court below, and no opportunity was given petitioners to traverse the same.

"Your petitioners further claim and show, that there was error on the part of this court in refusing to go behind the judgment originally obtained by Mrs. M. M. Fisher in suit 12,060 (page 60 of the transcript), in order to ascertain the fact as to whether or not the record of that case showed that Mrs. M. M. Fisher was entitled, under her pleadings, to avail herself of the jurisdiction of the United States Circuit Court, and in support of which contention petitioners again cite the case of Wisconsin vs. Pelican Insurance Company, 127 U. S. 292, and New Orleans vs. Benjamin, 153 U. S. 411.

"Petitioners also claim that there is error in the opinion and decree of this honorable court in its reasoning upon the sixth assignment of error, to-wit: 'That in view of the court the garnishment proceedings shown in the record were against the treasurer of the city of New Orleans as *ex officio* treasurer of the School Board,' whereas, in point of fact, the record shows that there were two separate garnishment or *fi. fa.* proceedings taken; one on page 120 of the transcript shows: that the marshal collected $312 56 from Charles H. Schenck, *treasurer of the city of New Orleans*, and the other, on pages 121 and 122 of the transcript, in answer to the garnishment, shows that Charles H. Schenck, treasurer of the city of New Orleans *and ex officio treasurer of the Board of School Directors*, had in his hands $1893 09, which was duly paid over to Mrs. Fisher.

"And your petitioners show that these two separate answers and returns show that Mr. Schenck was garnisheed in two different capacities. First, as *treasurer of the city of New Orleans*, and, second, as *treasurer of the School Board*. Consequently, under the law, the return under the garnishment as treasurer of the city of New Orleans

should be held as constituting an accounting up to that date between the plaintiff in this proceeding, the School Board and the city of New Orleans.

"Your petitioners further believe that there is error of the court in its statement relative to the ninth assignment of error, which reads as follows: 'The ninth assignment of error does not appear to be based on any affirmative ruling of the court below. It appears that leave was asked to file a plea to the jurisdiction and an order to show cause issued, but no ruling in the premises.'

"Your petitioners, in support of this contention, respectfully refer your Honors to the plea itself, which is found on page 49 of the transcript, and the order and ruling of the court relative to the same, which are found on page 51 of the transcript, and which reads as follows:

"EXTRACT FROM THE MINUTES.

"November Term, 1897.

"NEW ORLEANS, MONDAY, December 20, 1897.

"Court met pursuant to adjournment.

"Present: Hon. Charles Parlange, District Judge.

"MRS. M. M. FISHER
"*versus*
"CITY OF NEW ORLEANS. } No. 12,516.

"This day, in open court, J. J. McLoughlin, Assistant City Attorney, of counsel for defendant, presented a plea to the jurisdiction and a motion to fite same.

"Whereupon counsel for complainant and intervenors objected to the filing of the same on the grounds urged by them. *After hearing the counsel for both parties, the court refused the application to file said plea at this time.*"

"And it is this ruling of the court below which petitioners respectfully say was an error of that court, and we ask your Honors' review of the same.

"The law makes it the duty of the court at any time that it becomes apparent that a fraud has been perpetrated upon the court, and jurisdiction has been acquired by fraud, to stop the proceedings and investigate the question of jurisdiction. In support of which contention we refer your Honors to the fact that the plea of fraud and want of jurisdiction was raised by your petitioners, as appears from the plea found on page 49 of the transcript, and the judge below was wrong in the order which he made when same was presented to and argued before him, and which order is found on page 51 of the transcript, as aforesaid, refusing leave to file same.

"Under this state of facts we claim that the court should be guided by the principle laid down by the Supreme Court in Grace vs. Insurance Company, 109 U. S. 278, and thereunder remand this cause to the Circuit Court with orders to consider and try this sworn plea of fraud and lack of jurisdiction.

"Petitioners believe the court erred in holding in its reasons for overruling the seventh assignment of errors that the city is liable for interest collected on back school taxes. We respectfully submit that there is no authority cited by the defendants in error or by the court in support of the contention that the interest is a part of the taxes, and on the contrary, authorities were cited in our brief, all holding that penalties form no part of the tax, and we respectfully urge upon the court to reconsider this question, as we believe a consideration of the fact that we have cited numerous authorities in support of our contention, and our opponents have not cited a single decision in their favor, should be construed as a recognition of our position.

"We also respectfully submit that there is error in the court's conclusion that Sec. 3015 of the Civil Code applies to the city of New Orleans.

"The city was not a voluntary trustee in this matter, the collection of this money was forced upon her, and she had to collect it entirely at her own expense. Besides, the city charter of 1882 set aside all money collected from interest on delinquent city taxes as sacred to the public improvement fund, and the city has already expended that money on public improvements, as ordered by the Act 20 of 1882, Sec. 65, and it is wrong for the court to require her now, after she has expended it for that purpose under the mandate of the law, to turn it over to creditors of the School Board nearly twenty years after its collection and disbursement.

"Wherefore, petitioners, plaintiffs in error, pray that this petition for a rehearing be filed and considered, and that notice thereof be given to all parties in interest. And that, after due consideration and hearing, this petition be granted and rehearing had, and that the decree hereinbefore rendered be modified or set aside, so as to grant to petitioners the relief prayed for.

"And your petitioners further pray that in any event so much of your decree as increases the amount of said judgment as originally fixed by the decree of the lower court be set aside, and that the cross-appeal of said defendants in error be dismissed upon consideration of the transcript and proceedings No. 746, of the docket of this honorable court, which your petitioners plead as *res adjudicata* to the demands of said cross-appeal.

"And petitioners pray for such orders, rulings, process and decrees herein as may do justice and equity to and between all parties herein involved.

"And petitioners pray for all special, equitable and general relief."

18th. That on the —— day of March, 1899, the said court entered a decree, denying the said rehearing.

Petitioner here also assigns, as error, for the purposes of this application, and for all other purposes of this cause, should the writ of *certiorari* herein be granted, all the grounds for a rehearing, and the errors set out, in the said last mentioned application for a rehearing.

And your petitioner further assigns the following as error in the decree of the said Court of Appeals, in addition to the above.

I. That, as aforesaid, the complainant, Mrs. M. M. Fisher, having departed this life, after the entry of said decree of the Circuit Court, there was substituted as complainant, in her place and stead, her surviving husband, John Fisher, appearing in the capacity, after having qualified as such, of natural tutor of the minor children of himself and his deceased wife, the original complainant; that thereupon the said John Fisher, tutor, and all of the intervenors whose claims had been recognized by the decree of the Circuit Court, joined as plaintiffs in the suit for a mandamus hereinbefore described, against the Board of Liquidation of the City Debt, to pay and discharge the said judgments with funds derived from the sale of bonds of the city of New Orleans, issued under said Act No. 110, of 1890, and the constitutional amendment which it was designed to carry into effect; that the said suit for a mandamus was an acquiescence by the plaintiffs therein in the correctness of the said decree of the Circuit Court, and a judicial declaration that there was no error in the same to their prejudice; that in law, this would have confined the substituted complainant and intervenors in the said suit of Mrs. M. M. Fisher, et als. vs. City of New Orleans, or any review of the said decree in the Court of Appeals, to a demand for an affirmance of the decree of the Circuit Court, and was a bar to their urging any error in the same, and deprived the Court of Appeals of any power to amend the decree of the Circuit Court to the prejudice of defendant, or to the advantage of the said substituted complainant and intervenors; that notwithstanding this, on a cross-appeal taken by the latter, argued and submitted, together with the appeal of said defendant, and the appeal also of the defendant in the suit for a mandamus against the Board of Liquidation of the City Debt, against whom there was judgment in the Circuit Court, making peremptory the alternative mandamus issued in that cause, and hence, all of the pleadings, issues and facts

involved in both such cases, were before, and within the cognizance of, the said Court of Appeals, at the time of the said argument; and there was error in the decree of the Court of Appeals in its amendment of the decree of the Circuit Court, by the allowance of interest from January 24th, 1881, instead of from February 21st, 1898, as awarded by the Circuit Court.

That the said suit of the United States *ex rel.* John Fisher, Tutor, etc., et al. vs. Board of Liquidation of the City Debt, is still pending and undecided in the said Court of Appeals.

II. That the said decree of the said Court of Appeals, and also of the said Circuit Court, especially so much of the same as denied to defendant the right to plead and prove that the Circuit Court was without jurisdiction, by reason of the want of the requisite citizenship of the complainant, or that she was not an alien, notwithstanding her description of herself as such in her will, were wholly unsupported by law or evidence; that the action of the said Circuit Court upon defendant's offer to plead and make proof of the want of capacity of complainant to maintain this suit, and that of the said Court of Appeals in affirming the correctness of said action, was arbitrary and oppressive, and amounted to a denial of justice.

III. That the Court of Appeals erred in increasing the amount for which the decree was rendered by the Circuit Court, by nearly doubling it, in consequence of its allowance of interest from January 24th, 1881; that the acquiescence of cross appellants in the decree of the Circuit Court, shown by said record of Board of Liquidation vs. John Fisher, Tutor, etc., et al., before the court simultaneously with the record of the present case, showed thot cross-appellee was without right to complain of the decree hereid, in any respect.

That for the sake of convenience petitioner attaches hereto, as part hereof, an assignment of error, containing, in itself, all errors relied upon to support the petition, reserving the benefit of each, all and any assignment of errors contained in the body of the petition.

Wherefore, petitioner respectfully prays, that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said Circuit Court of Appeals, in said case, therein entitled The City of New Orleans, Appellant, vs. John Fisner, Tutor, etc., et al., No. 747, to the end that said case may be reviewed and determined by this court, as provided by section 6 of the act of congress, entitled "An Act to Establish Circuit Courts of Appeals, and to define and regulate, in certain

cases, the jurisdiction of the courts of the United States, and for other purposes," approved March 3d, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decree of the Circuit Court of Appeals in said suit, and every part thereof, may be reversed by this Honorable Court.

And your petititioner will ever pray, etc.

SAMUEL L. GILMORE,
City Attorney.
JAMES J. McLOUGHLIN,
Assistant City Attorney.
BRANCH K. MILLER,
Solicitors for Petitioner.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

Walter C. Flower, being duly sworn, deposes and says: That he is the mayor of the city of New Orleans, plaintiff in the suit of the City of New Orleans, Appellant, vs. John Fisher, Tutor, etc., et al., Appellee, No. —— of the docket of the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the foregoing petition, and the facts therein stated, are true to the best of his knowledge and belief.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
CITY OF NEW ORLEANS.

Samuel L. Gilmore, being duly sworn, deposes and says: That he is city attorney of the city of New Orleans; that as such, he has personal charge of the said city in the foregoing petion mentioned, in the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the said petition, by him subscribed, and the facts therein stated are true, to the best of his knowledge and belief.

EXHIBIT "A."

PETITION FOR MANDAMUS.

Filed June 2, 1898.

U. S. EX REL. JOHN FISHER, TUTOR, ETC.,

versus

BOARD OF LIQUIDATION.

No. 12,740.

To the Hon. the Circuit Court of the United States for the Eastern District of Louisiana:

The petition of the U. S. ex rel. John Fisher, the duly qualified natural tutor of his minor children, John B. Fisher, James M. Fisher, Wm. G. Fisher and R. B. Fisher, herein joined by U. Koen and U. Koen and Co., F. J. Gasquet, Mary Quinlan, Jean Pomes, G. T Young, Mrs. Mary Fortier, Mrs. A. B. Gage, E. F. Duclaux, said John Fisher being a citizen of Great Britain, respectfully represents:

That your relators have obtained a final decree in equity which is now executory, against the city of New Orleans, a citizen of Louisiana, under No. 12,516 of the docket of this Hon. Court for the sum of ($71,938.74) seventy-one thousand nine hundred and thirty-eight 74-100 dollars with legal interest from Feby. 21st, 1898, and costs, as appears by said judgment and proceedings hereto annexed and made part hereof;

That relators in accordance with the requisites of Act No. 5, of the extra session of 1870, of the Legislature of this State, have duly registered their said judgment in the office of the comptroller of this city;

That relators have made an amicable demand on the Board of Liquidation of the city debt, to pay or fund said judgment, but they have refused to comply with said demand on the ground that said judgment is not fundable;

Your relators aver that said judgment was obtained against said city of New Orleans for moneys had and received by the city of New Orleans during the years 1871 to 1878, for the benefit of relators, and which the said city appropriated to its own use;

That said claims having arisen during the years 1878 and prior years, are fundable and are to be paid by the Board of Liquidation under Acts No. 67, of 1884, and No. 110, of 1890.

Wherefore, relators pray that a writ of mandamus issue herein, directing the Board of Liquidation of the city debt to fund or pay the said judgment obtained by relators against the city of New Orleans, on the 21st of February, 1898, with interest and costs, or show cause, on such a day as this honorable court may fix, why said writ of mandamus should not be made peremptory, and relators pray for costs and for general relief.

(Signed) E. HOWARD McCALEB,
(Signed) CHAS. LOUQUE.
Atty. U. Koen and Mrs. A. B. Gage.

John Fisher, Tutor, etc., and U. Koen, E. F. Duclaux, Jean Pomes, F. J. Quinlan, the duly qualified agent of Mary Quinlan, being duly sworn, say that all the facts and allegation of the foregoing petition for mandamus, are true and correct.

(Signed) J. POMES,
" E. F. DUCLAUX,
" JOHN FISHER, *Tutor*,
" U. KOEN for self and
U. KOEN & CO.,
" F. J. QUINLAN.

Sworn to and subscribed before me this 2d day of June, 1898.
(Signed) EMILE POMES,
Not. Pub.

Charles Louque, being sworn, says that F. J. Gasquet is absent from this State, and that all the facts and allegations of the foregoing petition are true and correct.

(Signed) CHARLES LOUQUE,

Sworn to and subscribed before me this 2d day of June, 1898.
(Signed) H. J. CARTER,
U. S. Commissioner.

Order.

Let the defendant, the Board of Liquidation, show cause, on Friday, June 10th, 1898, at 11 A. M., why a writ of mandamus should not issue as prayed for.

(Signed) CHARLES PARLANGE,
U. S. Judge.

New Orleans, June 2d, 1898.

Marshal's Return.

Received by U. S. Marshal, New Orleans, La., June 3d, 1898, and

on the same day I served copy hereof on the Board of Liquidation of the City Debt by handing same to R. M. Walmsley, president thereof, in person, in the city of New Orleans, La.

(Signed) J. V. GUILLOTTE,
U. S. Marshal.
by JOHN EARLY,
Dy. U. S. Marshal.

ANSWER AND RETURN OF DEFENDANT.

Filed June 14, 1898.

United States ex rel. John Fisher, Tutor et al., vs. Board of Liquidation City Debt. } No. 12,740.

Now, comes the Board of Liquidation of the city debt, defendant herein, and for answer and return to the alternative order or writ of mandamus, and the rule to show cause why a mandamus should not issue, as herein prayed for, says:

It denies all and singular the allegations contained in the petition of relators, except so far as may hereinafter be specially admitted.

Further answering, defendant specially denies that the judgment or decree described in relators' petition is of the class which is entitled to be funded, or which defendant has the right to fund, under the law, particularly under the acts of the General Assembly of the State of Louisiana, Nos. 67, of 1884, and 110, of 1890.

Respondent specially denies that the said judgment or decree represents or is a claim or claims created for or against the year 1878 or any previous year;

Respondent further denies that the said judgment or decree is founded upon any floating debt or debts, or claim or claims, in the sense of the laws governing its action, particularly the said two acts of the General Assembly.

That the said judgment or decree is not based upon any liability of the city of New Orleans arising from contract; but is founded upon a cause of action arising from tort or torts for the funding of which class of indebtedness there is no want or authority in law.

Wherefore, respondent prays that relators' demand be rejected; the alternative writ of mandamus and the rule to show cause herein be discharged, and relators' suit be dismissed with costs, and for general relief.

(Signed) BRANCH K. MILLER,
Solicitor and Attorney for Respondent.

Affidavit.

Personally came and appeared before me the undersigned author-

ity, R. M. Walmsley, who, being first duly sworn, says, that he is the president of the Board of Liquidation of the city debt, defendant in this suit, and that the facts set forth and the allegations in the foregoing answer are true and correct.

(Signed) R. M. WALMSLEY.

Sworn to and subscribed before me, notary, at New Orleans, Louisiana, this thirteenth day of June, eighteen hundred and ninety-eight.

(Signed) EDGAR GRIMA,
Not. Pub.

JUDGMENT.

Extract from the Judgment Book.

April Term, 1898.

Circuit Court of the United States, Fifth Circuit and Eastern District of La., New Orleans Division.

New Orleans, Friday, June 17, 1898.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, District Judge.

U. S. ex rel. John Fisher, Tutor, et als., vs. Board of Liquidation of the City Debt. } No. 12,740.

Considering the verdict of the jury in this cause: It is ordered, adjudged and decreed that a peremptory writ of mandamus be issued to the Board of Liquidation of the City Debt, of New Orleans, commanding them and each of them, to fund or pay the decree obtained and rendered in the case of Mrs. M. M. Fisher vs. The City of New Orleans, No. 12,516 of the docket of this honorable court, to-wit: the sum of seventy-one thousand nine and thirty-eight and 78-100 dollars with 5 per cent. interest on $71,139.60 from February 21, 1898, and $799.18 from May 10, 1896, until paid, and all costs of said suit and also the costs of these proceedings.

Judgments rendered June 17, 1898.

Judgments signed June 23, 1898.

(Signed) CHARLES PARLANGE,
Judge.

6821

No. 806. 28th 46

Brf. of Miller & McLoughlin for Pet.

Office Supreme Court U. S.
FILED
MAY 1 1899
JAS. H. MCKENNEY,
Clerk.

Filed May 1st, 1899.

Supreme Court of the United States,

OCTOBER TERM, 1898.

EX PARTE THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, CREATED BY THE LAWS OF THE STATE OF LOUISIANA, PETITIONER.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

BRANCH K. MILLER,
JAMES J. McLOUGHLIN,
Solicitors for Petitioner.

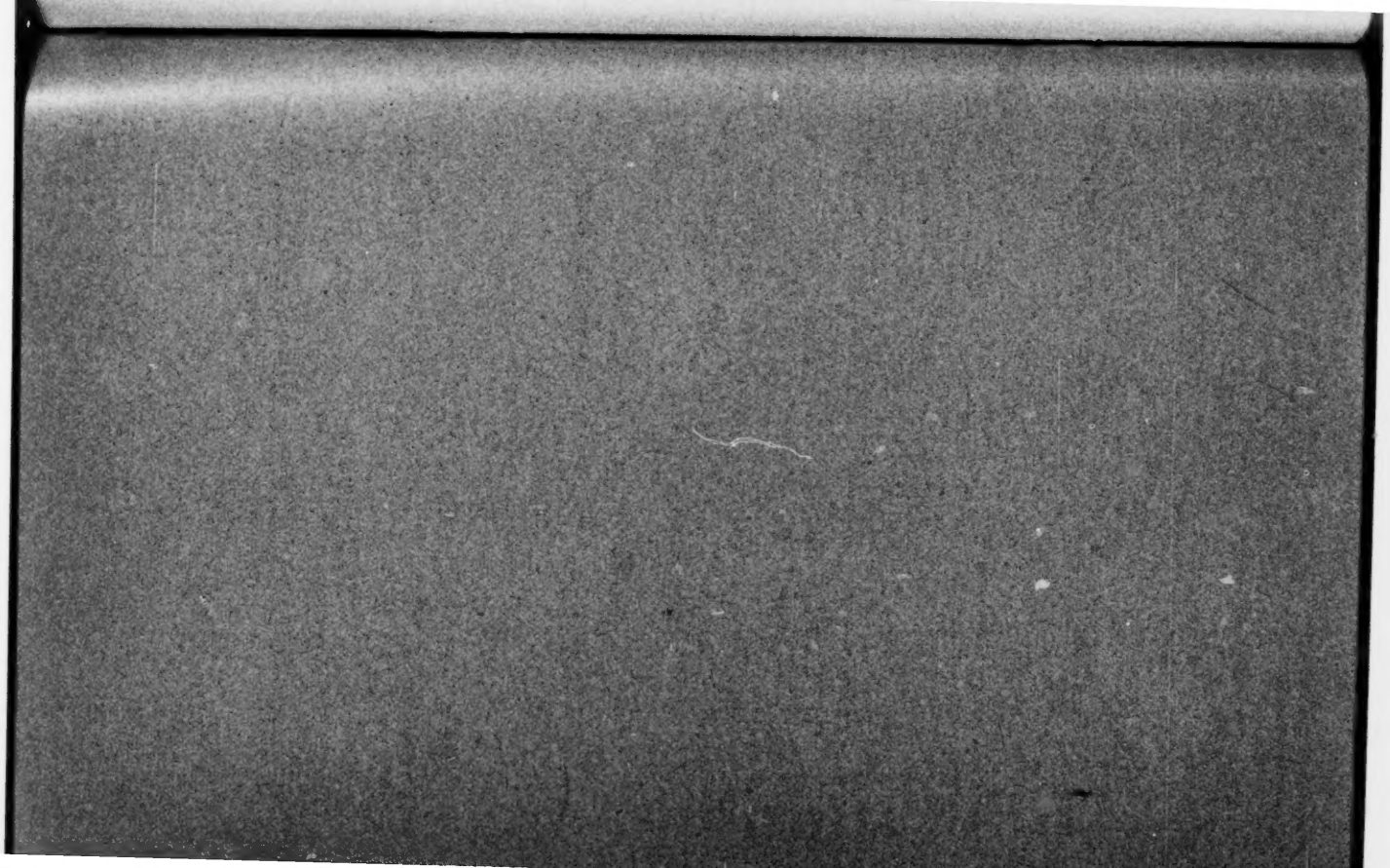
APRIL, 1899.

Filed _____ 1899.

_____

Clerk.

A. W. Hyatt Stety'Mfg Co., N. O.—30191.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1898.

EX PARTE THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, CREATED BY THE LAWS OF THE STATE OF LOUISIANA, PETITIONER.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

SYLLABUS.

Under section 5 of the act of Congress of March 3d, 1875 (18 Statutes at Large, p. 170), it is the duty of the Circuit Court to stop all further proceedings in, and to dismiss any suit, in which it shall appear at any time after the institution of the same, that the parties have been improperly or collusively made or joined, either as plaintiff or defendants; such fact may be brought to the notice of the court by the defendant, by a plea in abatement, by the answer, by affidavit, or otherwise; the time when such may be done is not restricted; such objection may be taken at any time, pending the suit; if the court should acquire knowledge of such facts, without the action of any party to the suit, or even if the parties should consent to proceed with the case, notwithstanding the want of jurisdiction, it is the duty of the court, of its own motion, in such case, to deny its own jurisdiction, and dismiss the suit. Williams vs. Nottowa, 104 U. S. 211; Farmington vs. Pillsbury, 114 U. S. 144; Hartog vs. Memory, 116 U. S. 588-591; Morris vs. Gilmer, 129 U. S. 325; Shreveport vs. Cole, 129 U. S. 36-44; Mansfield, Coldwater, Etc., R. R. vs. Swan, 111 U. S. 382; Nashua R. R. vs. Lowell R. R., 136 U. S. 374; Anderson vs. Watt, 138 U. S. 701; Lehigh Co. vs. Kelly, 160 U. S. 337.

It was error for the lower court to strike from its files a plea of defendant, setting up that complainant, suing as an alien, was not an alien, but a citizen of the same state as defendant, and to refuse to allow the filing of another such plea to the same effect, although such plea was tendered after issue had been joined by an answer, a reference to, and report by, a master, and exceptions filed to the report.

The conditions stated in the preceding paragraph do not constitute a case which, under section 5 of the act of March 3d, 1881, can be reviewed on the question of jurisdiction by the Supreme Court alone; in the case stated, the jurisdiction was not "in issue;" it was an effort to create or form such issue, which was prevented or not permitted, by the action of the court.

Interest on taxes, imposed as a penalty for delinquency, or as an inducement for prompt payment, is not an accessory of the taxes, nor a part thereof; the right to such tax does not carry with or include in it a right to such interest. Slack vs. Ray, 26 La. An 675; State vs. Fire Insurance Co., 41 La. An. 142; McChesney vs. People, 99 Ills, 219; People vs. Smith, 94 Ills. 226; Silsbee vs. Stockle, 44 Mich. 576; F. & P. M. Ry. vs. County Treasurer, 32 Mich. 260; Scammon vs. Chicago, 44 Ills. 269; Nance vs. Hopkins, 10 Lea (Tenn.), 508; Myers vs. Park, 8 Heiskel (Tenn.), 550; Desty on Taxation, vol. 2, p. 754.

Of the numerous grounds for the relief herein sought, set out in the petition, it is deemed sufficient for the purpose of this application, to bring specially to the notice of the court, only those set out below, to-wit:

1st. That the court erred in not reversing the decree of the Circuit Court, on account of the error of that court, in striking from the records of the cause, the pleas of defendant, denying the jurisdiction of the court, filed June 29th and July 1st, 1897, and its refusal to allow defendant to put such jurisdiction at issue, by a plea tendered for filing December 20th, 1897.

On July 1st, 1897, defendant filed in the Circuit Court a plea in in abatement, setting up that Mrs. M. M. Fisher, complainant, described in her bill as a citizen of the Kingdom of Spain, was, in fact, a citizen of the State of Louisiana, residing in the city of New Orleans; that the defendant was also a citizen of the State of Louisiana, and hence, the court was without jurisdiction of the cause; on motion to that effect, the Circuit Court, on December 20th, 1897, after hearing, ordered that the plea in abatement be taken from the files, (see Record, pp. 40 and 52); on the same day defendant tendered for filing, a plea to the original and supplemental bills, denying the jurisdiction of the court, on the same grounds set up in the plea filed July 1st, (see Record, p. 49), which said plea the court then and there, after hearing counsel for both parties, refused to allow to be placed of Record. (Record, p. 51).

This latter plea, set out that the facts upon which it was based, were not discovered until the exceptions had been filed to the master's report, although diligent search to discover the same had been previously made, through the Secretary of State, and the Consul General at Havana, Cuba; it further set out that the complainant's repre-

sentation of her spanish citizenship was for the purpose of acquiring jurisdiction herein by a fraud upon the court; that the defendant, in demurring and in answering in the cause, was ignorant of the fact that complainant was practicing and had practiced a fraud upon the Circuit Court, to obtain its jurisdiction; that defendant was mislead by the said fraud and misrepresentation, and that equity required that it be permitted to withdraw, or to treat as withdrawn, the demurrer and answer theretofore filed, and to place of record its said plea to the jurisdiction (see record, p. 49, *et seq*).

It may be inferred that the plea filed July 1st, was stricken from the record on the ground, that there was not affixed to the same the usual certificate of the solicitor; (see Petition for Rehearing, par. 11, record, p. 136); the plea, however, offered for filing December 20th, 1897, is not amenable to this objection, supported, as it is, by a certificate of defendant's solicitor, declaring that, in his opinion, the plea is good in law.

It is respectfully submitted, that there was error in the Circuit Court in striking the plea first named, from the Record, in refusing to allow the filing of the plea, and, also, in any event, in failing, then and there, *ex proprio motu*, to investigate the alien citizenship *vel non* of complainant.

Section 5 of the act of Congress of March 3d, 1875 (18 Stat., p. 470), provides:

"That, if in any suit commenced in a Circuit Court, or removed from a state court to a Circuit Court of the United States, *it shall appear*, to the satisfaction of said Circuit Court, *at any time*, after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy within the jurisdiction of said Circuit Court, or that *the parties to said suit have been improperly or collusively made or joined, either as plaintiff or defendants, for the purpose of creating a case cognizable* or removable under this act, the Circuit Court *shall proceed no further therein*, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, * * * ." (Italics ours.)

This points out with unmistakable clearness the duty of the court under the circumstances named.

Concerning this section, it has been said: "In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, *and imposes the duty on the court, on its motion, without further waiting for the parties*, to stop all further proceedings, and dismiss the suit, whenever anything of the kind appeared. This was for the protection of the court, as well as the parties, against frauds upon its jurisdiction, for it was very properly said by Mr. Justice Miller, speaking for the court, in Barney vs. Baltimore (supra), that such transfers for such purposes are frauds upon the court, and nothing more." Williams vs. Nottawa, 104 U. S. 211.

Speaking of the application of the act of 1875, in Farmington vs. Pillsbury, 114 U. S. 144, this court said:

"To protect the courts, as well as parties, against such frauds upon their jurisdiction, it was made the duty of the court, at *any time when it satisfactorily appeared*, that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties had been improperly or collusively made or joined, * * * for the purpose of creating a case cognizable under that act, *to proceed no further therein, but to dismiss the suit*, or to remand it to the state court from which it had been removed. This, as was said in Williams vs. Nottowa, 104 U. S. 209-211, imposed the duty on the court, of its own motion, without waiting for the parties, to stop all further proceedings, and dismiss the suit, the moment a fraud on its jurisdiction was discovered. The old rule established by the decisions, which required all objections to the citizenship of the parties, unless shown on the face of the record, to be taken by plea in abatement, before pleading to the merits, was changed, and the courts were given full authority to protect themselves against the false pretenses of parties. This is a salutary provision, which ought not to be neglected; it was intended to promote the ends of justice, and is *equivalent* to an express enactment by Congress that the Circuit Courts *shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, nor of suits in which the parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable under the act.*" (Italics ours.)

In Morris vs. Gilmer, 129 U. S. 325, speaking of the duty of dismissing a suit under the act of 1875, the court declared:

"It is true, that by the words of the statute this duty arose only when it appeared to the satisfaction of the court, that the suit was not one within its jurisdiction, but if the record disclosed a controversy, of which the court cannot properly take cognizance, its duty is to proceed no further, and to dismiss the suit, and its failure or refusal to do what, under the law, applicable to the facts proved, it ought to do, *is an error, which this court, upon its own motion, will correct*, when the case is brought here for review; this rule is inflexible, and without exception, as was said, upon full consideration, in Mansfield, Coldwater, etc., R. R. vs. Swan, 111 U. S. 379-382, which requires this court of *its own motion to deny its own jurisdiction*, and in the exercise of its appellate power, that of all courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record, on which, in the exercise of that power, it is called upon to act. On every writ of error or appeal the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to answer for itself, even were it not otherwise suggested, and without respect to the allegations of the parties,

* * * * * * * * * * * * *

and *the statute does not prescribe any particular mode in which such fact may be brought to the attention of the court;* it may *be done upon affidavits, or the depositions taken in the cause may be used for that purpose;* however done, it should be upon due notice to the parties to be affected by the dismissal." (Italics ours.)

In Nashua R. R. vs. Lowell R. R., 136 U. S. 374, speaking of a question of jurisdiction arising under section 5 of the act of 1875, it was said:

"By this statute *the time at which such objection may be raised* is not thus" (as it was prior to the adoption of such act) "restricted, but it *may be taken at any time after suit brought* in the case mentioned.

"The principal object of the statute was to relieve the national courts from the necessity of passing upon cases, where it was plain that no question was involved within their jurisdiction, and thus free them from consideration of controversies of a frivolous and questionable character, and to prevent fraudulent and collusive attempts to invoke the jurisdiction of those courts, as had frequently been the practice, by collusive transfers of property or choses in action, by a citizen of one state to a citizen of another, to enable the latter to go into those courts, the original owner still retaining an interest in the property or choses in action transferred, or taking a contract of retransfer of the same to himself, after the termination of the litigation. In such cases, it is undoubtedly *the duty of the court below, of its own motion, to deny its jurisdiction*, and of this court, on appeal or writ of error, to see that that jurisdiction has in no respect been thus imposed upon. Moris vs. Gilmer, 129 U. S. 315; Farmington vs. Pillsbury, 114 U. S. 138-143." (Italics ours).

"Under the act of March 3d, 1875, determining the jurisdiction of Circuit Courts of the United States (18 Stat. 470-472), the objection to the jurisdiction, upon a denial of the averment of citizenship, is not confined to a plea in abatement, or a demurrer, but may be taken in the answer, and the times at which it may be raised are not restricted; although the averment as to citizenship may be sufficient, yet, if it appear that that averment is not true, it is the duty of the Circuit Court to dismiss the suit, and this court, on appeal or writ of error, must see to it that the jurisdiction of the Circuit Court has in no respect been imposed upon. Anderson vs. Watt, 138 U. S. 701; Morris vs. Gilmer, 129 U. S. 315-325; Nashua R. R. vs. Lowell R. R. 136 U. S. 356-374; Cameron vs. Hodges, 127 U. S. 322-325."

See, also, Shreveport vs. Cole, 129 U. S. 36-44; also, Lehigh Mining and Manufacturing Co. vs. Kelly, 160 U. S. 339, *et seq.*, wherein it is stated particularly, that the fifth section of the act of 1875 was not superseded by the act of 1887, amended in 1888.

In Hartog vs. Memory, 116 U. S. 588-591, it was held, that the evidence upon which the Circuit Court acts in dismissing a suit for want of jurisdiction, must not only be pertinent to the issue made by the parties, or to the inquiry instituted by the court, but it must also appear of record, if either party desires to invoke the jurisdiction of this court, for review.

If this rule were applied here, it might be well doubted whether the rules announced by the cases cited were pertinent, since, as a matter of fact, the citizenship of complainant was not put at issue by the answer, and not sought to be raised otherwise than by pleas tendered after the answer was placed of record, and the master's report filed; but in view of decisions of this court subsequent to that in Hartog vs.

Memory, it would seem that it was not material how or when the attempt was made, to bring to the notice of the court its lack of jurisdiction; for instance, in Morris vs. Gilmer, 129 U. S. 326, it was contended that the defendant had precluded himself from raising the question of jurisdiction by inviting the action of the court upon his plea of former adjudication, and by waiting until the court had ruled that plea to be insufficient in law; and in support of this petition, Hartog vs. Memory was cited; the court, after declaring that it had held the same in Metcalf vs. Watertown, 128 U. S. 586, said, that whether the Circuit Court had or had not jurisdiction, was a question which this court must examine and determine, even if parties forbear to make it, and consent that the case be considered upon its merits; that the court, in Hartog vs. Memory, certainly did not intend to modify or relax the rule announced in previous well considered cases; that in that case, the Circuit Court had summarily dismissed the action, upon the ground solely of want of jurisdiction, without affording the plaintiff any opportunity whatever to rebut or control the evidence, upon the question of jurisdiction; that the failure, under the peculiar circumstances disclosed in that case, to give such opportunity, was of itself sufficient to justify a reversal of the order dismissing the action, and that what was said, was irrelevant to the determination of that question, was unnecessary to the decision, and could not be regarded as authoritative.

In Nashua R. R. vs. Lowell R. R., 130 U. S. 373, it was declared, that while, under the earlier legislation and practice, the question of jurisdiction could be raised only by a plea in abatement, or demurrer, and not by answer, that this rule was modified by the act of 1875, and that (p. 374), under that statute, the time at which such objection might be raised was not thus restricted, but that it might be taken at any time after suit brought in the cases mentioned.

In Anderson vs. Watt, 148 U. S. 701, it was held, that an objection to the jurisdiction, upon a denial of the averment of citizenship, is not confined to a plea in abatement, or a demurrer, but might be taken in an answer, but that the time within which it might be raised was not restricted.

In Lehigh Mining & Manufacturing Co. vs. Kelly, 160 U. S. 337, the court, of itself, without its action being invited by any party to the suit, noticed the want of jurisdiction in the Circuit Court, declaring that the presumption *in every stage* of a cause brought in a federal court being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record.

While some of the above cases dealt with a state of facts in which there was a collusive assignment to a party possessing the citizenship requisite to maintain a suit in the Circuit Court, from another party or parties not thus qualified, it is respectfully sub-

mitted that the rule they announce, is equally applicable to the case of a plaintiff possessing the same citizenship as a defendant, falsely representing himself to be an alien.

It may be said that the court cannot consider the question of jurisdiction in this proceeding, for the reason that under section 5, of the act of March 3d, 1891 (26 Stat. 826), appeals or writs of error from the Circuit Court are direct to this court, and not the Court of Appeals, in any case in which the jurisdiction of the court is "in issue;" the reply to this is, that it appears from the record of the present case, that the jurisdiction of the Circuit Court was never made an issue; that the court declined to entertain any plea of the defendant, setting up a want of jurisdiction; that the Circuit Court rendered no decree, either affirming or denying its jurisdiction; that in order for this court to review the judgment of the lower court upon the question of jurisdiction, obviously the latter must, in some form, have rendered judgment either affirming or denying the same; the conditions in the Circuit Court must be such that either plaintiff or defendants could have appealed from a judgment on the plea in abatement, the defendant could not have pursued the course pointed out in Jahn vs. United States, 155 U. S. 109, because there was no order or decree of the Circuit Court affirming its jurisdiction, which it could have brought to this court by appeal, while carrying the case for all other purposes of appeal, to the Court of Appeals; had it done so, there would have been no order or decree, interlocutory or otherwise; which this court could either have affirmed or reversed; the action of the Circuit Court which is here complained of was its order of December 20th, 1897, striking from the files of the court, its plea in abatement, denying the jurisdiction of the court, on the ground that the plaintiff was a citizen of the State of Louisiana, filed July 1st, 1897, and its order of December 20th, 1897, refusing the application to file a plea setting up the want of jurisdiction, on the same grounds.

Evidently, this was not a case in which the jurisdiction of the court is in issue, in the sense of section 5 of the act of 1891; it was the refusal of the court to allow such an issue to be made, which is here complained of.

It may be well doubted whether the present suit is ancillary to the suit mentioned in the bill, in which complainant had already recovered judgment in the Circuit Court; while its ultimate effect, if successfully maintained, would be to enforce or execute the judgment in that case, the bill seeks a like satisfaction of two other judgments, both of which were rendered by the Civil District Court for the parish of Orleans; the judgment first mentioned was at law; (R., p. 60); the present suit is not between the same parties as the original one, the city of New Orleans here being added as a co-defendant; it does not relate to the subject-matter of the original proceedings, which was

the ascertainment and liquidation of the sum owing by the School Board to complainant, while here, it is sought to establish an indebtedness by the city to the School Board, out of which complainant demands payment.

But even if the present suit be considered ancillary to the original one, in which complainant obtained a judgment at law in the Circuit Court, the jurisdiction of the first case, could be attacked here as effectively as it could have been in the former suit; Lawrence Manufacturing Co. vs. Janesville Mills, 138 U. S. 552-561; Gay vs. Parpart, 106 U. S. 679.

The plea in abatement, tendered on December 20th, 1897, for filing (Rec., p. 49), expressly charged that at the time she instituted her original suit, No. 12,060 of the Circuit Court, complainant was a citizen of the state of Louisiana; it appears that as a matter of fact, complainant, Mary Fisher, born Blackadder, was a native of the State of Virginia, and had lived in the city of New Orleans for thirty-eight years (Rec., p. 125); that John Fisher, her husband, was born in Scotland, and came to the United States in 1859; that on January 31st, 1896, he declared, in the Circuit Court of the United States, his intention of becoming an American citizen, and that he further intended to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereign whatever, particularly to the queen of Great Britain and Ireland. (Rec., p. 142).

It would also appear, from the affidavit of Fisher himself (Rec., p. 142), "that he had lived in the United States since 1859; that he was a machinist by trade, and that by reason of his occupation, he was called (occasionally by the necessities of his business) to the island of Cuba, at different periods since 1861." (Rec., p. 142.)

By article 185 of the constitution of Louisiana, of 1879, in force on May 11th, 1896, when the present suit was filed, it is provided that, among others, every male person of foreign birth who may have legally declared his intention to become a citizen of the United States, should be an elector, and entitled to vote at *any election* of the people; this would qualify Fisher to vote at an election for a member of Congress, the qualifications of such elector, being the same as those required for electors of the most numerous branch of the state legislature; by article 22 of the same constitution, any elector under the same is declared to be eligible to a seat in the House of Representatives, and if over twenty-five years of age, eligible to the Senate; save that he had not been ten years a citizen of the United States, by which is meant his qualification to vote for members of Congress, and to hold office, he would have been eligible, under article 60 of the State constitution, for governor or lieutenant governor.

The right to vote and to hold office, however, is not necessary to constitute citizenship in the sense of the acts of 1875 and 1888; "a

citizen, in the sense of the statute, is one who resides in and is an inhabitant of the state. It is evident that he need not possess the qualifications which would enable him to exercise the elective franchise, or hold real estate." Garland & Ralston's Federal Practice, section 125.

2d. The Court of Appeals erred in amending the judgment of the Circuit Court, so as to allow interest upon the suit for which the decree was entered, from January 24th, 1881, instead of allowing the decree of the lower court to remain unchanged in this particular; this allowed interest only from February 21st, 1898; it will be noted that this change would allow interest for seventeen years more than was awarded by the Circuit Court; this would nearly double the amount of the latter.

The following facts are relied upon to sustain this assignment, and the complaint thereunder made.

After the entry of the decree of the Circuit Court, defendant, by appeal, without supersedeas, carried the case for review to the Court of Appeals; subsequently, the complainant filed a cross-appeal; shortly after the decree of the Circuit Court became final and executory, and before taking their cross-appeal complainant, and the intervenors, whose claims had been recognized by the Circuit Court, took steps to have the decree executed, and the amount it awarded to them, paid and discharged; this they proceeded to do by the institution in the Circuit Court, of a suit in which they prayed for a mandamus against the Board of Liquidation of the City Debt, a corporation created by Act 133, of 1880, and the several acts amendatory thereof, charged with the exclusive control and direction of all matters pertaining to the judgment and bonded debt of the city of New Orleans; its duties are prescribed, and its powers defined, by the said act of 1880, Act 67, of 1884, Act 110, of 1890, and the constitutional amendment proposed bp the same, and Act 128, of 1890; in the said suit for a mandamus it was set up that plaintiff's decree was one of a class of judgments which it was the duty of said Board to pay and discharge, and there was prayer for a mandamus compelling the Board so to do; the latter set up the defenses which are set out in its answer in the said suit, the Record of which, filed as part of the petition in the present proceeding; there was judgment of the Circuit Court making the mandamus peremptory, and ordering the Board to do as prayed by the petition; this cause, the defendant Board carried by writ of error to the Court of Appeals; it was therein argued and submitted on the same day as the present case, on the appeal of the defendant therein, immediately after the latter was argued and submitted, on the cross-appeal of the complainant and intervenors.

Under these conditions, the Court of Appeals had full cognizance of all of the pleadings, issues and facts disclosed by both records, and

by reason of the relation of one case to the other, knew judicially, and could consider in either case, any knowledge derived from the record of the other; this would necessarily inform the court that the cross-appellants in the suit against the city, had acquiesced in the judgment, which, on their cross-appeal, they were assailing as erroneous, as regards its allowance of interest; the acquiescence was shown by their availing themselves of the power of the Circuit Court to execute the judgment as originally rendered, by enforcing its payment, through the remedy of mandamus.

A party cannot, while affirming the correctness of a decree in this method, simultaneously, especially before the same court, attack it as erroneous; the cross-appeal was taken after the mandamus suit was instituted, which would afford at least some ground for the conclusion that it was an afterthought; in any event, after having set up the entire correctness of the decree of the Circuit Court, which is obviously involved in proceedings for its enforcement, they carried the case to the Court of Appeals on their cross-appeal; all merit of the cross-appeal, if not all basis for it, if any there were, was completely destroyed and taken away by the previous institution of the suit for a mandamus; it is charged in this connection that the Court of Appeals was in error in making any change in the decree of the Circuit Court, to the advantage of cross-applicants, or to the prejudice of the defendants.

3d. The court erred in holding that the interest on the taxes claimed and by the court held to be due by the city, was a part of the taxes themselves, for which the city was accountable to the School Board, and should have paid over to the same, as in case of the taxes themselves.

Under the order of reference (Rec., p. 21), the master found (Rec., p. 25, *et seq.*), that the principal of the school taxes collected by the city from years 1871 to 1878, both inclusive, and not paid over to the School Board, amounted to $23,180.03, and that the proportion of the interest actually collected by the city on taxes of said years, to which School Board was entitled, was $48,758.75; it is complained here, that there was error in the order of reference, so far as it assumed that the city was responsible to the School Board for the said interest, and in the report of the master, finding such liability, and the confirmation by the court of the master's report, so far as concerns the present matter. (Rec., p. 51, *et seq*).

The taxes upon which the interest complained of was allowed, were levied for the years 1871, 1872 and 1873, under section 7, of Act No. 8, of 1871, which requires that the Board of School Directors of the City of New Orleans, immediately upon their organization, and also at the commencement of each year thereafter, should ascertain the amount of funds necessary to carry on the schools under their charge for the current year, and report the same to the Board of Ad-

ministrators of the city of New Orleans, who should, at such time as they might deem necessary, levy the amount on the taxable property of the city, and direct the same to be collected in the manner and at the time by them deemed most desirable; that the time should not exceed six months from the date of their notification of the amount required.

It is apparent from a mere reading of this section, that the amount of the tax levy was to be such as was necessary to carry on the schools, and no more; it was not contemplated that there should accumulate in the hands of the School Board any surplus over and above what was requisite to conduct the schools; the amount of the tax could not exceed what was required for the annual school expenses, ascertained by the School Board, at the commencement of the year; obviously this amount was to be fixed and certain; likewise, as to the tax, which could be levied for such sum, and no more; any interest that might accrue upon delinquent taxes could not be taken into consideration in fixing the amount to be collected, for the reason that the amount to be realized in that form, could not be ascertained in advance with any certainty, and, consequently, not relied upon to supply any portion of the amount, ascertained as requisite to discharge the yearly expenses; the sum to be realized in the form of interest would depend upon the amount of taxes which would become delinquent, and for how long a time they remained in this condition; the longer or shorter the time the delinquency continued, the greater or less would be the accumulation of interest; it was intended that the taxes levied and collected should be precisely the same in amount as the estimated expenses of the year; if the interest were added to the tax provided, this would give the School Board a sum greater than what the law designed that it should have; no proper tax levy could be made which would include any sum on account of interest, as a source out of which the annual expenses were to be paid; for the reasons stated above, that the amount to be realized from such interest would be impossible of estimation in advance, with that degree of certainty which was required; from these considerations it would appear, that it was no part of the purpose of the act of 1871, in providing a revenue to carry on schools, that any part of this should be derived from delinquent interest on school taxes.

The school taxes derived as above, we are informed by section 7, are "to be collected in the manner and at the time by them (the Board of Administrators of the city) deemed most desirable."

While not desiring to base this argument on narrow technical lines, it will be readily admitted that complainant, who sets up an affirmative right to the interest in question, carries not only the burden of proof, but also that of argument, to make it clear, that its claim is well founded; the imposition of interest is usually a penalty

for delinquency, and an inducement for prompt payment; and is also regarded generally as one means of enforcing the collection of taxes; the Board of Aministrators being the governing body of the city of New Orleans, could perform no official act of the kind involved here, save by the adoption of an ordinance; (see section 12, par. 20, Act No. 7, of 1870, the city's charter); the title of the School Board to the interest in question, would depend entirely upon whether it acquired such, by virtue of section 7, of Act No. 8, of 1871; it is only by effect of this that the Board could be entitled to the tax itself, and the interest is claimed here, as an appurtenance, or accessory of the same; the Board has a right to whatever is given to it under section 7, and to nothing more; this vests in the Board the right to all taxes in any event, levied pursuant thereto; it provided nothing as to interest, and hence, unless as a means of enforcing the tax, the city imposed the payment of interest as a penalty for non-payment of the tax when due, there would be none to which the Board is entitled; it was not shown in the court below that the city had pursued any such course, the proof simply being that she had collected the interest, whether under lawful authority or not, not appearing, otherwise than as it might result from the presumption that the city proceeded as authorized and directed by law; therefore, in the present condition of the record, we are justified in saying that while complainant may have apparently established a legal right to whatever was collected by the city of school taxes, in principal, there is an entire absence of any showing of its title to the interest thereon; and hence, confining ourselves to the showing made in the Circuit Court, and consequently in the Court of Appeals, it was not sufficient to award complainant amount more than double the principal in the form of interest.

Moreover, the imposition of penalties for the non-payment of taxes being one of the means employed to enforce their payment, it is not a part of, but entirely extraneous to, and foreign to the tax itself. Nance vs. Hopkins, 10 Lea (Tenn.), 508; Myers vs. Park, 8 Heiskel (Tenn.), 550; Lacey vs. Davis, 4 Mich. 140; and other authorities cited in Desty on Taxation, vol. II, p. 754.

To subject the delinquent to the payment of interest on his taxes is one form of penalty. McChesney vs. People, 99 Ills. 219; People vs. Smith, 94 Ills. 226.

The interest in such case is no part of the tax, but is as separate and distinguishable therefrom, as any other mode of enforcement could be; it is not entirely unreasonable to say, that the city in the present instance, being charged with the duty and burden of collecting the tax, might fairly retain the interest, by the imposition of which, it was intended to coerce payment.

The imposition of penalties for the non-payment of taxes is one of the means employed to enforce payment; it is a remedy differing

in kind, but identical in nature, with the sale of property for the collection of taxes, milder, but in character differing from a sale of the property, only in severity and completeness; the imposition of interest as a penalty is included in the power to tax, which carries with it authority to use all means necessary or useful to accomplish this object.

Slack vs. Ray, 26 La. An. 675.

From this it would appear, that so far from the interest being a part of the taxes, it stands in a relation altogether independent and extraneous to the tax itself; interest, as a means of enforcing collection of taxes, cannot be imagined otherwise than as a separate and independent idea,—a mere agency by which the tax is collected; an independent force exercised in reference to the tax, in character the same as the seizure of property subject to the tax, and its advertisement and sale by the tax collector.

In city of New Orleans vs. Fire Insurance Company, 41 La. An. 142, the right of the city of New Orleans to impose a penalty of two per cent. per month interest on delinquent licenses was questioned; and the power upheld, on the ground that, under a legislative grant to enforce a collection of any taxes due, the city had the authority to impose a penalty, thus referring the imposition of the penalty to the power to enforce collection.

The failure to pay taxes, when due, may subject the party owing the same to the payment of interest thereon in the nature of a penalty.

McChesney vs. People, 99 Ill. 219;

People vs. Smith, 94 Ill. 226.

The penalty of interest cannot be considered a part of the tax.

Silsbee vs. Stockle, 44 Mich. 576;

F. & P. M. Ry. vs. County Treasurer, 32 Mich. 260;

Scannon vs. Chicago, 44 Ill. 269.

While it may be said, that it would be inequitable to permit the city to retain the interest, while there are school creditors unsatisfied, out of the taxes themselves, to which the law referred them for payment, it is a sufficient answer to say that if such be the case, it would signify nothing more, than that the fund provided for the payment of school debts is insufficient; this would afford no ground to apply to the discharge of school obligations, funds which were never intended by law for that purpose; if the interest not paid by the city, has by it been employed to pay its own debts, or of meeting items of necessary municipal expense, it has done what the law permitted it to do, if, by the act of 1871, interest on school taxes was not vested in the School Board; this suit being to establish title to a fund which has been used by the city for its own purposes, it is not enough to show that the city had no right to the interest; to succeed, complain-

ant must further show, in herself, a clear right to the interest ascertained by the city; in this connection, it is significant that the School Board has, for a period extending all the way from eleven to eighteen years, never made any demand or set up any claim, judicially or otherwise, to the interest in question, and in fact, in its answer filed in the present suit, has expressly disclaimed any right, title, or interest thereto or therein; (see Rec., p. 17, *et seq.*); it denies any indebtedness to it by the city of New Orleans, on account of said taxes, and avers that the latter has fully complied with all her legal obligations to the Board.

All school taxes were levied under section 7, of the act of 1871, until Act No. 36, of 1873, went into effect, by section 4, of which the city was required to levy a tax of not less than one-fourth of one per cent. on the taxable valuation of all property in the city of New Orleans, by which a revenue for the support of the schools was obtained for subsequent years, beginning with 1874; it would appear from the language of this section that it was the tax alone, and no part of the interest thereon, which was given for school purposes; the argument presented as to the proper construction of section 7, of the act of 1871, applies with equal, if not greater force, to defendant's contention that, under the act of 1873, it was not intended that the Board should receive anything more than the principal of the tax.

By section 2, of Act 36, of 1873, the Board of School Directors is ordered, in October of each year, to adopt an estimate of debt and expenditure, and communicate the same to the council of the city of New Orleans; by section 3, it is made the duty of the council *to make provision* for the support of the public schools, and *for that purpose* to levy a tax of not less than one-fourth of one per cent. on the taxable valuation of all property in the city; by section 5, is enumerated the revenues of the Board for necessary expenses, and the uses and purposes of the schools, among which is named the annual tax just mentioned; the provisions of this act differ in no essential particular from those of the statute of 1871.

The collection of school taxes, under both laws, is committed to the city; it is not reasonable to suppose that the School Board was intended to profit by any money collected as a means of enforcing the tax; neither the act of 1871, nor that of 1873, directed either the levying or collection for the benefit of the School Boar of a single dollar more than the face of the tax; these statutes determined the rights of the Board, and likewise those asserted by complainant here; whatever title she may have to any part of the school taxes can arise nowhere else than from the two laws in question; these entitled the Board to the face of the tax alone; the council in both instances was to levy the tax, as well as to collect it; and by the ordinance making the levy, the city could have provided the penalty by the imposition of interest,

or not, just as it chose; the acts of 1871 and 1873 simply give the council power to levy the tax, without imposing upon it the duty of including penalties for its non-payment; it was not mandatory upon the council to visit delinquency with the payment of interest; if it chose to do so, it was in order to facilitate the collections by holding out to the taxpayer an inducement to pay promptly; what the School Board was entitled to, is to be found in the statutes, and not in the ordinances; at any rate, in no part of the latter which went beyond what the statutes provided; the interest is collected under the ordinance, and not under the statutes, which make no mention of interest, in consequence of which it is entirely excluded from any amount the Board was entitled to receive from the city.

The court erred, in any event, even if the city were liable to the School Board for the interest on said taxes, to have rendered a decree against her for the same, and this for the reason that she had long since paid over the principal of said taxes, which were received by the School Board in full settlement of all she owed.

The city, in the manner stated, having made a settlement with the School Board, satisfactory to [illegible] accepted by both parties, as a discharge of all that the city owed, and this settlement having remained unquestioned and undisturbed for so many years prior to the institution of the present suit, should not have been reopened and set aside, as is done by the decree herein; the School Board itself, on the showing made by this record, would not be permitted to question the acquittance resulting from its receipt of the taxes in principal, without any claim for interest, and complainant in this respect can occupy no stronger position than her debtor; she seeks to avail herself of an indebtedness, which she charges to be due by the city to the School Board; in a suit by the latter against defendant, the settlement would be a complete defense; the burden of proving the indebtedness averred, is carried by complainant; the answer of the School Board herein (Rec., p. 17, *et seq.*), declaring that the city owed it nothing, and had fully accounted for and paid over to it all school taxes which she collected, would show that, as between the city and the board, there was no question at all that the former owed nothing.

4th. That the court erred in including in its decree the sum of $11,933.00, which is declared by the master's report to be a discount allowed by the city to the tax payers for payment of school taxes, as the bill only asks that the city be compelled to pay the actual amount of cash collected; as she never collected this sum, it is error to hold her accountable for it.

By reference to the prayer of the bill, it will be seen that it demands a full, fair and perfect account of all school taxes *collected* for the years from 1873 to 1878, inclusive; it is true, it further prays for an account of all taxes not collected for want of proper enforcement,

but these manifestly are such only as had been cancelled by tax sales made by the tax collectors, and no amount which the city remitted by way of a discount to obtain settlement.

It is deemed unnecessary to discuss in detail the other grounds upon which this application is based, which are set out in full in the grounds urged, both in the Circuit Court and the Court of Appeals, for a rehearing, and the assignment of errors for the appeal filed in the Circuit Court, all of which are set out in detail and at large in the petition herein, and which it is prayed that this court take and consider in the assignment of errors for this application, and for the hearing on the same, should the writ of certiorari applied for be granted; the court is respectfully asked to consider all of these grounds, which are not mentioned, and in support of which no argument is made in this brief; by the latter circumstance they are not intended to be waived, but, on the contrary, are insisted upon, as valid grounds for the relief herein sought.

Respectfully submitted,

SAMUEL L. GILMORE,
City Attorney,
JAMES J. McLOUGHLIN,
BRANCH K. MILLER,
Solicitors for Petitioner.

APRIL, 1899.

No. 46.
Supt. Bk. of McLoughlin v Miller
for Petitioner

OCT 12 1900
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Filed Oct. 12, 1900.

No.

THE CITY OF NEW ORLEANS, PETITIONER,

versus.

JOHN FISHER, TUTOR, ETC., ET AL.

On writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL BRIEF FOR CITY OF NEW ORLEANS.

JAMES J. McLOUGHLIN,
BRANCH K. MILLER,
Solicitors for Defendants and Appellants.

Kolb & Lecler, Printers, 516 Natchez St., N. O.

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SYLLABUS.

I. ON THE QUESTION OF JURISDICTION.

1. When a record shows that the Court originally acquired jurisdiction on Complainant's averments that she is a Spaniard and her husband also a Spaniard, and yet, after decree, the husband's solicitor changes this averment and swears he had been misinformed, that, in reality, the husband is a British subject, and does not change the averment that the

wife is a Spanish subject, this will be ground sufficient for for the Court to investigate the question of jurisdiction, *ratione personae.*

2. Particularly so, when the record affirmatively shows the Complainant to be a native-born American, who has lived thirty-eight years prior to her death in Louisiana, and never was in Spain, and never was married to a Spaniard.
3. When a plea is filed, accompanied by the affidavit of the Mayor of a great city, charging complainant with obtaining the jurisdiction of the Court by fraud and imposition, and the plea on its face specifies the fraudulent acts, and the fact of their discovery only after issue joined, the Court should receive and try the plea.

   Grace vs. Insurance Co., 109 U. S. 278.
   Williams vs. Nottawa, 104 U. S. 109.
   Hartog vs. Memory, 116 U. S. 591.
4. When a suit is brought on a judgment, the Court may go behind the judgment for the purpose of ascertaining if the cause of action on which that judgment was based were such as could give the Federal Courts jurisdiction.

   Wisconsin vs. Pelican Insurance Co., 127 U. S. 292.
5. If such inquiry establishes the fact that the original choses in action were not suable in the Federal Court, or that no averment was made that the original holders could sue in the Federal Court, the suit should be dismissed for want of jurisdiction.

   New Orleans vs. Benjamin, 153 U. S. 411.

On the Merits.

6. The Complainant is not entitled to any part of the taxes of 1871, where it is shown that she neither prayed for them in her bill, nor did any of her debts arise for services performed during that year.
7. One having an adequate remedy at law is not permitted to invoke the equity powers of the Court to attain his ends.
8. A penalty imposed upon a taxpayer for delinquency forms

no part of the tax. Taxes are not debts. Interest on taxes is really a penalty.

Saunders on Taxation, p. 244.
Cooley on Taxation, p. 13.
Ryan vs. State, 5 Nebraska, 576.
McEnery vs. Reed, 23 Iowa, 410.
People vs. Peacock, 98 Illinois, 172.
R. R. Co. vs. Saginaw Co., 32 Michigan, 260.

9. This suit being analogous to garnishment proceedings, the debtor may plead prescription.

Preliminary.

Before entering into the consideration of the various questions raised by the pleadings in this case, Solicitors for the defendants desire to inform the Court that the record does not establish the fact that the parties to this controversy are citizens of different States. On the contrary, circumstances arising after the decree was rendered, but before rehearing was refused, which circumstances are apparent on the face of the record, raise grave doubts whether the case fell within the jurisdiction of the Circuit Court at all.

Your Honors will find that this suit was originally brought by Mrs. M. M. Fisher, and that her right of action is based upon a judgment rendered in suit No. 12,060, the petition of which suit is found printed in the Transcript, pages 91 and 92. The opening clause of that petition states:

> "The petition of Mrs. M. M. Fisher, born Blackadder, duly authorized and assisted by her husband, M. M. Fisher, who appears herein, for said purpose, and joins his said wife herein, both citizens of the Kingdom of Spain, and residing in the Island of Cuba."

The same allegation is made in the bill of complaint, copy of which is found on page 1 of this transcript, which begins this suit, No. 12,516, to-wit:

"Mrs. M. M. Fisher, herein joined and authorized by her husband, M. M. Fisher, of Cuba, and citizens of the Kingdom of Spain."

The judgment rendered in suit 12,060, which is found on page 52 of the Transcript, reads as follows:

> "By reason of the verdict of the jury herein and in accordance therewith: It is ordered, adjudged and decreed that the plaintiff, Mrs. M. M. Fisher, and her husband, M. M. Fisher, have judgment in *her* favor, and against the Board of Directors of the City Schools of New Orleans, for the sum of eight thousand and ninety-seven and 17-100 dollars, with 5 per cent. interest per annum, from May 22, 1890, and costs, payable out of the school taxes levied by the City of New Orleans prior to 1879." (Our italics.)

From which it appears that Mrs. Fisher and her husband were both subjects of the Kingdom of Spain. Your Honors will find on page 123 of the transcript, what is styled the "replication to plea," signed "Charles Louque, Solicitor," which contains this statement:

"He (the complainant, Fisher) avers that he is a citizen of the British Empire and he now annexes proof of his averment."

Your Honors will also find on page 112 of the transcript a certificate of the Board of Health proving the death of Mrs. M. M. Fisher, the Complainant in this case. That shows that Mrs. Fisher was "married to John Fisher, and thirty-eight years in the City of New Orleans," and that "she was a native of Virginia, aged 43 years and died on the 25th day of February, 1898."

These facts called to the attention of the Court must certainly convince your Honors that Mrs. Fisher could not be a citizen of a country whose soil she never trod, and to which her husband never owed or claimed allegiance. She was born in Virginia, lived in New Orleans for 38 years, and died here at the age of 43 years.

Her husband makes a solemn averment that he has always been a subject of Great Britain. Under this State of facts, which is disclosed by the record itself, and which was not disclosed until after the decree herein had been rendered, we think it is apparent to the Court that it is the duty of your Honors to apply the principle stated in 109 U. S., page 278, in the case of Grace vs. American Central Insurance Company, which states, in the opinion, as follows:

"As the jurisdiction of the Circuit Court is limited in the

sense that it has no other jurisdiction than that conferred by the Constitution and the laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears."

Also, in the same case, the Court says:

"The record in this case presents a question of jurisdiction which, although not raised by either party in the Court below, or in this Court, we do not feel at liberty to pass without notice."

And, going on with the consideration of that case, the Supreme Court reversed the judgment, sending it back to the Circuit Court with this instruction:

"We have called attention to the insufficient showing as to the jurisdiction of the Circuit Court, so that, upon the return of the cause, the parties may take such steps touching that matter as they may be advised."

Therefore, as the face of this record discloses the fact that John Fisher never was a subject of Spain, that his wife never was in Spain, but was a native of Virginia—a life-long resident of New Orleans; that she taught school in this city; that she was raised here and died here, we submit that it is clear on the face of the record that the United States Circuit Court had no jurisdiction.

See also Simonton on the Federal Courts, pages 54 and 55.

At any rate, sufficient cause is shown for the Court to do with this case what the Supreme Court did in the Grace case (109 U. S. 278), and remand it to the Circuit Court for the parties to "take such steps touching the matter (of jurisdiction) as they may be advised."

STATEMENT OF THE CASE.

In the years 1874, 1875 and 1876, Mrs. M. M. Fisher, the plaintiff in this case, and other persons, were teachers in the public schools of New Orleans. For their services they were dependent upon a school tax. By law this tax was devoted to the payment of the claims of the school fund. There not being sufficient money to pay the payrolls at the end of each month, it became the

custom and habit of the School Board to issue to the teachers certificates. These certificates simply certified that the party named "had performed services as teacher in the public schools for the month of ——— and was entitled to be paid on the rolls of that month."

By endorsement they were assignable, and were bought by brokers and money lenders at various discounts.

Under the legislation of the State, relative to school funds and other funds, the payment of the expenses of each year was restricted to the taxes or revenues of such year. Under this legislation there accumulated during the years from 1871 to 1878, inclusive, a great number of unpaid school certificates, usually for the last two months of each year.

When the Constitution of 1879 was adopted, the school fund and other funds were placed on different footings and at the same time, instead of restricting each year's revenues to each year's expenditures (as far as concerned taxes, debts and expenses prior to 1879), all unpaid taxes to 1879 were bulked into one fund, and no more separate accounts kept for each year (Act 74 of 1880).

Between 1879 and up to a few years ago, the holders of these various school certificates brought suit and placed them in judgment. The suits were brought in some instances against the School Board only, in some instances against the City of New Orleans, and in some instances against both the School Board and the City of New Orleans.

The jurisprudence of the State on this question is now settled, that these certificates are not debts of the City of New Orleans, but that they are simply debts of the School Fund of the years prior to 1879, and are to be paid "in due course" of this fund, when collected and turned over to the School Board.

See Labatt case, 38 La. An., page 283.

Numerous attempts were made, by acts of the Legislature and otherwise, to have these school certificates, either assumed by the city, or to have the city declared liable for their payment. But such attempts failed, the Court holding that the only fund out of which these certificates could be paid was the uncollected taxes for years prior to 1879.

On May 22, 1890, Mrs. M. M. Fisher filed a suit, No. 30,362, in the Civil District Court against the Board of Directors, asking for a judgment for eight thousand and ninety-seven and 17-100 ($$,097.17) dollars and interest. In this suit judgment was rendered June 23, 1891, in the following terms:

> "It is ordered, etc., that there be judgment in favor of the plaintiff, Mrs. M. M. Fisher, recognizing her as a creditor of the School Board of the City of New Orleans for the sum of eight thousand and ninety-seven and 17-100 ($8,097.17) dollars, with legal interest from judicial demand until paid, to be paid *in due course* out of the school tax levied prior to 1879." (Transcript, p. 93.)

This judgment was appealed to the Supreme Court, and in 1892 that Court rendered a judgment, a copy of which is in this record (transcript, pp. 91 to 96), and the opinion of the Supreme Court says:

> "The Board of Directors administered the school affairs without any possible control on the part of the city authorities. The Treasurer of New Orleans is *ex-officio* treasurer of the Board and receives all funds collected for the support of the public schools. Upon him devolves the payment of payrolls and evidences of indebtedness to teachers and other employees of the Board. He pays upon the order of the School Board. Judgment against the School Board for the

recognition of the claim against the city, and affirming the judgment against the Board of School Directors."

In the syllabus the Court says:

"The City of New Orleans turns over amounts collected for schools to the treasurer of the School Board. This officer notes the taxes of the different years and applies the amount to the payment of the certificates from the taxes of those years from which the creditors are entitled to payment."

The attention of the Court is called to the fact that it is this very judgment, obtained in this suit in the Civil District Court, that is sued upon in this present proceeding.

Mrs. Fisher goes to the Federal Court.

Having obtained her judgment in the Civil District Court, Mrs. M. M. Fisher carried the record from the Civil District Court to the Circuit Court of the United States, and on February 23, 1892, in suit No. 12,060 of that Court, she proceeded against the Board of Directors of the Public Schools, citing the fact that she had obtained a judgment in the Civil District Court, annexing the record, and filing it in the Federal Court.

She asked the Federal Court to give her a judgment for the eight thousand and ninety-seven and seventeen-one-hundredths ($8,097.17) dollars and interest, payable out of the school tax levied by the city prior to 1879. In other words, she presented a final judgment obtained by her in the Civil District Court in a suit against the Board of Directors of the Public Schools, and asked from the United States a similar relief against the same parties.

What her object was we do not know, unless it were to gain the process of the United States Court to aid her in enforcing the State judgment when the whole power of the State was at her disposal to enforce the judgment.

The United States Circuit Court, in suit No. 12,060, gave her the judgment she asked, and she thereupon proceeded to garnishee Charles H. Schenck, treasurer of the City of New Orleans, and *ex-officio* treasurer of the School Board, in his dual capacity.

In his answers filed July 26, 1894, he swore that he had one thousand eight hundred and ninety-three and nine-one-hundreths dollars ($1,893.09) to the credit of school taxes for the years prior to 1879, and his answers were not traversed; the money was turned over and there the matter rested.

This money, the one thousand eight hundred and ninety-three and 9-100 dollars ($1,893.09), was paid over to Mrs. Fisher by Mr. Schenck. This the record shows. Not content with this, on December 23, 1895, the marshal, under a *fi. fa.* issued in this same case, collected from Mr. Charles H. Schenck, "Treasurer of the City of New Orleans," a further sum of three hundred and twelve and 56-100 ($312.56) dollars; but Complainant, in argument and brief, contended that this money was paid over by Mr. Schenck, not as treasurer of the City of New Orleans, but as treasurer of the School Board. The record shows that such is not the case.

The marshal's return (Transcript, page 100) shows that one thousand eight hundred and ninety-three and nine-one-hundredths ($1,893.09) dollars payments were paid by Charles H. Schenck, city treasurer and *ex-officio* treasurer of the School Board; and the marshal's return (Transcript, page 105) shows that the three hundred and twelve and fifty-six-one-hundredths dollars were paid by Charles H. Schenck, treasurer of the City of New Orleans, thus showing that at the time she issued her *fi. fa.* and garnishment Mrs. Fisher exhausted the funds both in the hands of the city and the School Board. It may be noted, *en*

passant, that the decree of February 21, 1898, gave the city no credit for the $312.56. Consequently, as far as the collection of money is concerned it is clear that this garnishment was directed against the City of New Orleans.

Jurisdiction.

The first point to which we wish to call the Court's attention is the city's plea to the jurisdiction, *ratione personae*. It is true that this plea was not made until after the master's report had been submitted (Transcript, page 43), and it is true that the judge of the lower court refused to entertain the plea (Transcript, page 45), the finding of the Court being:

> "The Court refused the application to file said plea at this time."

In the lower Court, in our demurrer, we claimed that this judgment could not be sued upon in the United States Court, for the reason, as is stated in our eleventh assignment of errors, that Mrs. Fisher's debt consisted of choses in action, which were assigned to her, and which choses in action were not suable in the United States Court, and there is no allegation in the bill of complaint in this present suit, 12,516, or in the other suit, 12,060, that the assignors of said choses in action could sue in the United States Court.

Consequently there are on the question of jurisdition two distinct claims on the part of the City of New Orleans, to-wit:

1. That Mrs. Fisher is a citizen and resident of the State of Louisiana, of which State the City of New Orleans and School Board are also citizens and residents, consequently the Court has no jurisdiction, *ratione personae*. Which fact we did not discover until July, 1897.

This plea was not filed until after the master's report had been made; but we supported our plea by affidavit which specifically set forth the fact that Mrs. Fisher had practiced a fraud upon the Court, and we asked to be allowed to withdraw our demurrer and answer filed previously by us to be permitted to try this plea to the jurisdiction.

We hope that the conscience of the Court, this being an equity proceeding, will permit us to make this defence, for surely the United States Court will not lend its process to any one that seeks to obtain it for a fraudulent purpose.

2. We also plead that this claim of Mrs. Fisher being based upon *choses in action*, assigned to her, which *choses in action* were not suable in Court by the original assignors, *and there being no averment either in her bill of complaint in this case, or in her petition in suit No.* 12,060, *that the assignors could sue in the United States Court*, on the face of the papers it does not appear that the Court has jurisdiction.

In fact, in the case of Williams vs. Nottawa, 104 U. S., page 109, the Court said: "It was the duty of the Court, on its motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of that kind appeared."

If, therefore, the Supreme Court of the United States holds it to be the *duty* of the United States Court, *of its own motion*, to dismiss any suit wherein it appears that the Court has been imposed upon by parties not within its jurisdiction, how much more should the Court do so when this fact is called to its attention by the innocent victim of the fraudulent misrepresentations.

The Complainant in this case contends that her *choses in action* have been merged in a judgment, and that it is now too late for

us to question the nature of the claim on which that judgment was founded.

This very question was considered and answered by the Supreme Court of the United States in the matter of Wisconsin vs. Pelican Insurance Company, in the 127 U. S. 292. The State of Wisconsin had obtained a judgment against the Pelican Insurance Company, a citizen of Louisiana, in the Courts of the State of Wisconsin. Suit was instituted by the State of Wisconsin in the Supreme Court on the judgment obtained by it, under the provisions of the Constitution giving to the Supreme Court jurisdiction, "between a State and a citizen of another State," and giving to the Supreme Court original jurisdiction in all cases "in which a State shall be a party." The Court looked beyond the judgment sued upon, and determined that the courts of the United States had no original jurisdiction of the cause and dismissed the suit. The Court say, in the opinion on page 292:

> "The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and the technical rules which regard the original claim as merged into the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it can not go beyond the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is one of such a nature that the Court is authorized to enforce it. Louisiana vs. New Orleans, 109 U. S. 285, 288, 291; Louisiana vs. St. Martin Parish, 111 U. S. 716; Chase vs. Curtis, 113 U. S. 452, 464; Boyton vs. Ball, 121 U. S. 457, 466."

The record positively shows that this suit could not have been originally brought in this Court by the original holders and assignors of the claims sued upon.

Now, if it be true, that it is the right and duty of the Court to examine into the judgment, for the purpose of ascertaining whether the claim is really one of such a nature as to authorize the Court to enforce it, then your Honors may direct yourselves to the consideration of the judgment in suit 12,060.

Nature of Claim.

You will find the petition in that case on page 48 of the Transcript, and in that petition you will find an allegation to this effect:

> "That your petitioner's claim, which formed the basis of the aforesaid judgment, was for the salary due to petitioner for work actually done as a school teacher of the public schools of the City of New Orleans, and for the salary of other teachers whose claims were transferred to your petitioner, as the whole more fully appeared by the certified copies of the petition, answer and judgment, both of the District Court, and affirmed by the Supreme Court of Louisiana, on appeal."

Your Honors will find no allegation that assignors could sue in the Federal Court; of course, they could not do so, but there is not even an allegation to that effect.

Under these circumstances, we think that your Honors should follow the rule laid down in the Benjamin case, 153 U. S., p. 411, wherein it is said:

> "Whether this suit be regarded as seeking a decree against defendants as on a creditor's bill, or by analogy to garnishment process, it was, under the pleadings, a suit to recover the contents of choses in action within the meaning of the judiciary act of 1887 and 1888, and, as the bill contained no

averment that the suit could have been maintained by the assignors, the jurisdiction of the circuit can not be sustained on the ground of diverse citizenship."

Indeed, the Supreme Court, in the case of Hartog vs. Memory, 116 U. S., in the opinion on page 591, has expressed itself as follows:

> "No doubt, if, from any source, the Court is led to suspect that the jurisdiction has been imposed upon by the collusion of the parties, or in any other way, it may at once, of its own motion, cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition."

Consequently having filed a plea to the jurisdiction on the ground of fraud and imposition, and having sworn to that fact, and having also sworn that this fraud and imposition were not discovered until after the master's report had been filed, and having immediately upon discovering that fact, filed our plea to the jurisdiction, we are satisfied your Honors will recognize the justice of our prayer, that we be permitted to have the necessary inquiries made in order to substantiate our charge of the fraud that has been practiced upon the Court by the complainant in this case.

Complainant Abjures Spain, and Claims British Nationality.

In this connection we call your Honor's attention to the plea of abatement filed April 23, 1898, by the city (Transcript, page 120), asking that the suit be abated because the record showed that the complainant, Mrs. Fisher, and her husband, were subjects of the King of Spain, and that M. M. Fisher, being a

Spanish subject, was unable to prosecute this suit, because of the war between the United States and Spain, then existing. On the 27th of April, 1898, Fisher demurred to this plea of alienage (Transcript, pp 121 and 122), and on April 27, 1898, (Transcript, p. 123), without setting aside that plea of alienage, Fisher averred that he was a citizen of the British Empire, and on the same page (123 of the transcript) the solicitor for Mrs. Fisher swears to the Court that he himself had been imposed upon by Mrs. Fisher, as per his affidavit found on page 123 of the transcript, which reads as follows:

> "Charles Louque, being duly sworn, says that the allegation in the bill that complainant, Mrs. M. M. Fisher, was a Spanish subject was made by counsel from information received from her, that all the proceedings herein were conducted under the instructions of Mrs. M. M. Fisher, and it was only lately when Mr. John Fisher returned from Cuba to be qualified as natural tutor of his minor children that affiant learned from him that he was a British subject."

And again, your Honors will notice that on the next day, April 28, 1898, Mr. Louque, the solicitor for Mrs. Fisher, had the plea of alienage overruled, the grounds for such overruling being stated in his motion, which is printed on page 126 of the transcript.

Under the circumstances we think that the city was entitled to a rehearing to try the question of citizenship. (See petition for a rehearing, Transcript pp. 141 to 143).

To state the matter succinctly, this case was conducted from its inception until the rendering of the final decree under a sworn statement of the complainant in this case that she and her husband were citizens of Spain.

After the decree had been rendered, and while the question for a rehearing was pending, she came into Court and altered all her pleadings by setting up that instead of her husband being a citizen of Spain, he was a citizen of Great Britain, without permitting the city to plead or to put at issue the question of that citizenship.

Now, we submit that if it be good law (in which, however, we can not agree) that it was too late for us to plead to Mr. and Mrs. Fisher's Spanish allegiance, after we had filed our answers to the original suit, we are sure that we can plead and should be allowed to plead to her husband's subsequent allegation that he is a British subject.

We desire the opportunity to show that he is not a subject of Great Britain, and when the Court allowed him to file such a plea thus changing his citizenship alleged before, the same equity should have been allowed the City of New Orleans and the School Board to answer this and put at issue, whether or not he was a citizen of Great Britain.

But the record shows that while the trial judge permitted Mrs. Fisher to change her citizenship at the last moment, the city and the School Board never tried that plea.

If there are no other errors but this single one, to-wit, change of averment of citizenship in a Federal Court, we think that that alone would be sufficient to have the case remanded for a rehearing on this point.

The allegation of citizenship is certainly one of the most important in a bill of complaint.

And the opportunity should certainly be given the City of New Orleans and the School Board to put at issue and try this question whether or not the Fishers are British subjects.

Argument and Assignment of Errors.

Le us now take up the assignment of errors in regular order, as enumerated in our application for a writ of *certiorari*.

First.

The first assignment is, that it was wrong for the Court to decree judgment against the city for any part of the taxes of 1871.

We submit to the Court that this should not require a great deal of argument. Not one of the complainant's certificates upon which this claim arose was for services rendered in 1871. The taxes of 1871 are not and should not be at all involved in this discussion.

Mrs. Fisher has no claim whatever on these taxes; she does not ask for them in her bill of complaint; it was evidently through some oversight that the year 1871 was included in the master's reference, and under that oversight he took evidence and ascertained how much taxes for 1871 had been collected and not paid over to the School Board, and we submit that that of itself does not give the plaintiff the right to claim the same. Were that so, she might as well call for all the uncollected taxes due to the School Board for seventy-five years back. This being a case of equity and it being nearly thirty years since most of the taxes were collected (if they ever were collected), we submit that we should not be ordered to pay over in this case any taxes or funds which do not form part of the years during which the alleged indebtedness represented by the school certificates held by complainant was created.

Consequently we ask a reduction of the seven thousand eight

the School Board, and are in its custody. In fact, we submit to the Court, that whatever cause of action complainant may have against her judgment debtor—the Board of School Directors—she has none against the City of New Orleans. Her remedy may be by a *mandamus,* directing the School Board to show why that corporation should not be compelled to call on the city for an accounting. Then we would quickly see whether or not the School Board has any claim against the city, and certainly, until it is established or alleged that the city owes something to the School Board, no creditor of the School Board can call on the city for any such account as this complainant so elaborately sets forth. We submit that her remedy, if any she has, is not the one prayed for in her bills of complaint.

If the city were the real defendant, and if it has failed to collect taxes, or if it has taken property for taxes, which it does not properly administer, then in the language of the Supreme Court, in Walkley vs. City of Muscatine, 6 Wall. 482:

"We are of the opinion that the complainant has mistaken the appropriate remedy in the case, which was by writ of *mandamus* from the Circuit Court, in which the judgment was rendered against the defendants. The writ affords a full and adequate remedy at law. There are numerous recent cases in this Court on the subject.

"We have been furnished with no authority for the substitution of a bill in equity for the writ of *mandamus.*

"Knox County vs. Aspinwall, 24 How. 376; Rogers vs. Keokuk; Von Hoffman vs. Quincy, 4 Wall. 535; Galena vs. United States, 5 Wall. 705; Riggs vs. Johnson County, 6 Wall. 166; Webster vs. Lee County, 6 Wall. 210; United States vs. Keokuk, 6 Wall. 514; United States vs. Muscatine, 8 Wall. 575;

Rees vs. Watertown, 19 Wall. 107; Heine vs. Levee Commission, 19 Wall. 655; Lower vs. United States, 91 U. S. 536; Cass County vs. Johnston, 95 United States, 360; Cass County vs. Jordan, 95 U. S. 373; United States vs. Clark County, 95 U. S. 769; United States vs. New Orleans, 98 U. S. 381; Louisiana vs. St. Martin, Parish, 111 U. S. 716; Labatte County vs. United States, 112 U. S. 217; Clay County vs. McAleer, 115 U. S. 616; New Orleans vs. United States, 118 U. S. 136; Girardeau County vs. United States. 118 U. S. 68."

Consequently, as she has an adequate remedy in law, it is wrong to permit her to proceed in equity.

Fifth.

The fifth assignment of error is that the complainant had no right to sue the City of New Orleans because her judgments are against the School Board. A reading of the bill of complaint of Mrs. Fisher in this case, No. 12,516, will show the Court that nowhere in her original or supplemental bills does she allege that the City of New Orleans is in any way indebted to the School Board.

Consequently, in her pleadings, she has no right to proceed against the city, for the basis of her action and her prayer for relief must be a claim that the School Board is a creditor of the City of New Orleans.

It is the School Board that owes the certificates issued to the original assignors in this case, and unless the City of New Orleans owes the School Board money it is incompetent for any of these assignors or assignees to bring any proceedings against the city, and as they have nowhere alleged or claimed that the city owes the School Board, they should not be allowed to prove a matter that is not alleged or set up in their own bills of complaint.

Sixth.

The sixth assignment of error, relative to writs of *fi. fa.*, issued against the city as garnishee, in suit 12,060, has been treated fully in the brief filed on the application for a writ of *certiorari* herein.

Seventh.

The seventh assignment of error is as follows:

> "The Court erred in approving the finding of the master that the interest or penalty on delinquent taxes formed a part of the taxes and should be turned over to the Board. But even though this was correct (which, of course, is not admitted), we hold that the Court erred in ordering the city to pay over the penalty on the taxes which she had already paid over. In any event she should not be compelled to pay over the penalty on any taxes, except on those taxes which are still in her possession. In other words, the master's report shows twenty-three thousand one hundred and eight and three-one-hundredths dollars of principal, and we submit that only the penalties on this twenty-three thousand one hundred and eight and three-one-hundredths dollars should be turned over, and not the penalties on the taxes that were turned over to the Board years ago."

This point has been argued in briefs already filed. We simply desire to add a few authorities bearing on the question, as to whether or not the penalty imposed by the sovereign or by a municipality upon taxpayers for failure to pay their taxes when due constitutes a part of the tax itself.

Every Court where this question was raised decided in the negative. "Taxes are not a debt; they are a forced contribution,

required from the citizens for the support of the government." (Saunders on Taxation, p. 344; Cooley on Taxation, p. 13).

"The interest which is exacted from the delinquent taxpayer is nothing more or less than a penalty imposed upon him for not paying his taxes when due. *The penalty is not a part of the taxes.*" (Ryan vs. State, 5 Neb. 276.) Am. & Eng. Encyclopedia of Law, Vol. 25, p. 303. (Our italics.)

"Taxes are not assignable as debts. A person claiming as assignee of a tax can not sue for its collection." McEnery vs. Reed, 23 Iowa, 410.

"The assignment of rights to sue for and enforce taxes voted by a township does not pass the right to the assignee discharged of the equities between the assignor and the taxpayers." Sully vs. Drennan, 113 U. S. 287.

"The repeal of a statute imposing a tax is not within the meaning of constitutional prohibitions against the passage of laws impairing the obligation of contracts." Cases cited in Cyc. Law, Vol. 25, p. 14, note 5; Lane Co. vs. Oregon, 7 Wallace, 71.

"*A percentage added to the tax because of its non-payment is not interest, but a penalty.*" People vs. Peacock, 98 Ills. 172. (Our italics).

See also State *ex rel.* Railroad Co. vs. Saginaw Co., 32 Mich. 260.

See also City vs. Davidson, 30 La. Ann., p. 541.

See also Shreveport vs. Gregg & Ford, 25 La. Ann., p. 836.

See also Morris vs. Lalaurie, 39 La. Ann., p. 53.

Eighth, Ninth and Eleventh.

The eighth, ninth and eleventh assignments of errors have been discussed already in this and our original brief, and it is not

necessary here to repeat the arguments there submitted to your Honors.

Tenth.

The tenth assignment of error is as follows:

> "It was error for the Court not to have allowed the plea of prescription made in the answers of the defendants, for as the complainant's cause of action arose in 1873 and subsequent years, the last year being 1879, the same was prescribed by prescription of ten years and subsequently her suit would have been dismissed on the consideration of this plea."

Your Honors will find this plea of prescription raised in the twelfth section of the answers of the city. (Transcript, p. 13).

Under the law of Louisiana, this money was due, if it was due at all, to the School Board by the City of New Orleans. The treasurer of the City of New Orleans was also the treasurer of the School Board, and was a member of that Board, and was paid for his services by that Board. Consequently the School Board knew, and must have known exactly, how the finances stood at all times; and under the law of Louisiana all personal actions are prescribed by ten years, and suits for debts due prescribe in three years.

If this is a suit for a debt due, it prescribed in three years; if it is a suit for a personal action, it prescribed in ten years. If it is a suit on a tort, it prescribed in one year.

Louisiana Civil Code, Article 3536: The following actions are prescribed by one year:

That for damages resulting from offences or *quasi*-offences.

Louisiana Civil Code, Article 3538: The following actions are prescribed by three years.

That for the salaries of teachers of the sciences, who give lessons by the year or quarter.

Louisiana Civil Code, Article 3544: In general all personal actions, except those before enumerated, are prescribed by ten years.

Louisiana Civil Code, Article 3547: All judgments for money, whether rendered within or without the State, shall be prescribed by the lapse of ten years from the rendition of such judgments.

Under any circumstances the plea of prescription should be held good, for the reason that more than ten years have elapsed from the time the money was received by the treasurer of the City of New Orleans (who was also the treasurer of the School Board) up to the time that this suit was instituted.

Twelfth.

The twelfth assignment of error is, that the Court was wrong in holding that the school taxes were a trust fund levied by the City of New Orleans for the purpose of paying the expenses of the public schools in New Orleans.

The school taxes were not a trust fund, and particularly the taxes for school purposes for the year 1871, which are not claimed by complainant. Nor does she claim any taxes at all except the "school tax" ordered levied by Act 48 of 1873 and Act 123 of 1874 (see her original petition, transcript, pp. 91 and 92). And surely the tax of 1871 can not be included in them, by any process of reasoning.

Thirteenth.

The thirteenth assignment of error was that the Court was wrong in holding there was any privity between the city and Mrs. Fisher.

This matter has been settled by the Supreme Court of this State in the case of Labatt vs. New Orleans, 38 La. Ann. 289; and again reiterated in the case of Fisher vs. New Orleans, when the identical judgment now discussed was appealed to that Court. (See Transcript, pp. 94 and 95).

Fourteenth.

The fourteenth assignment of error is, that it was wrong for the Court to order the whole fund to be paid over to the complainant and intervenors in this case. Of course the city is not affected injuriously by such a finding. But as Mr. Steen's summary (which is found on page 53 of the transcript) shows that there are two hundred and eleven thousand three hundred and forty-seven dollars and thirty-eight cents of school certificates outstanding, and as the record in this case shows that only a little more than one-half of these are held by complainant and intervenors in this proceeding, it appears to us that it is the duty of the city to call these facts to the attention of the Court in order that proper notice by publication may be given to all parties, as was done in the Warner case and other cases, so that all persons interested in the distribution of this fund should be given an opportunity, by public notice, to know that this case is pending, and come forward and assert their rights. The other errors assigned are discussed in our brief previously filed.

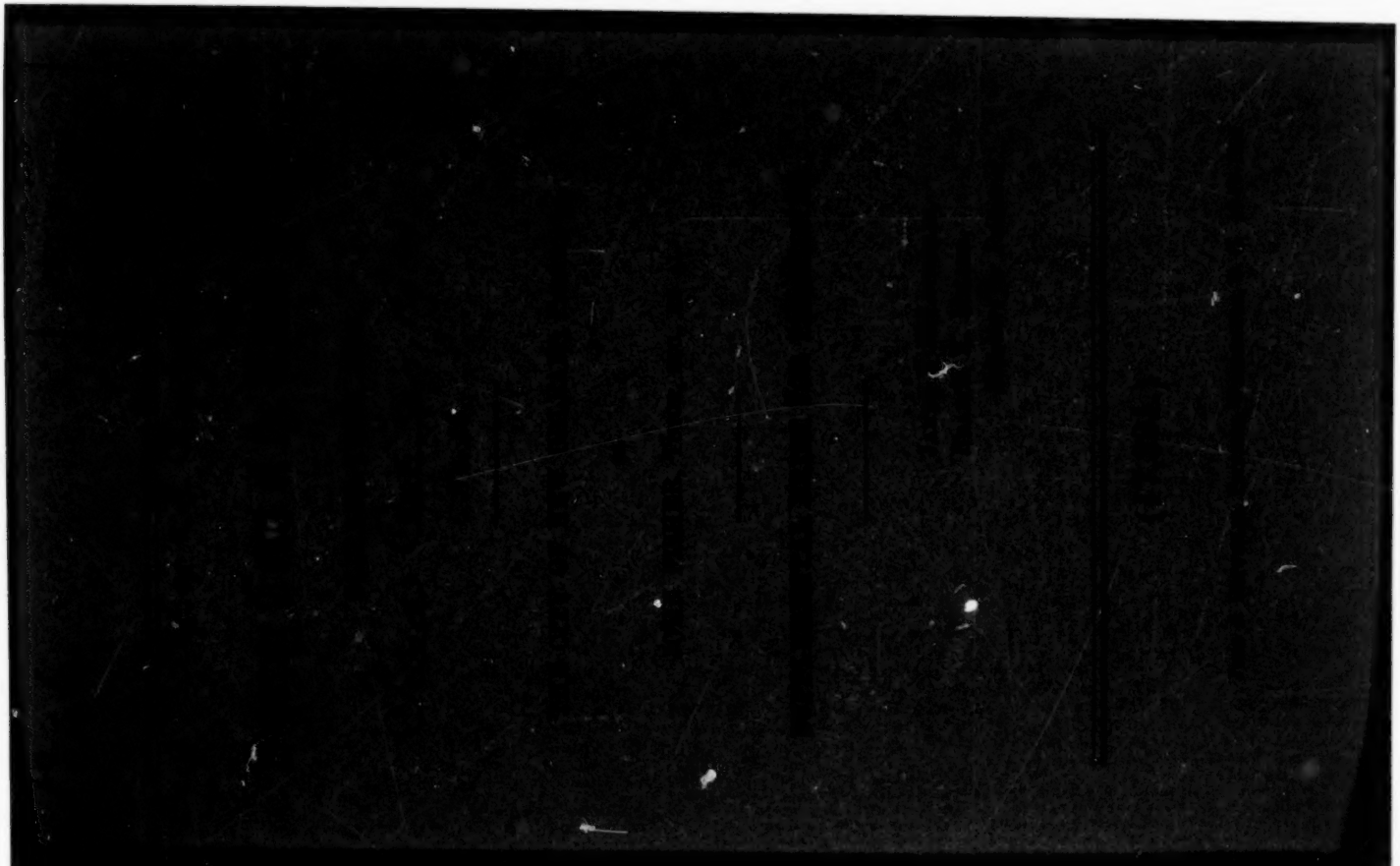
We respectfully submit the case, and we respectfully ask that the decree of the lower court be reversed and the case be remanded, with instructions to dismiss the complainant's bills.

Respectfully submitted,

JAMES J. McLOUGHLIN,

BRANCH K. MILLER,

Solicitors for Defendants and Appellants.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 46.

THE CITY OF NEW ORLEANS, PETITIONER,

against

JOHN FISHER, TUTOR, &C., ET AL.

Supplemental Brief for Petitioner, The City of New Orleans.

I.

In the brief and oral argument of the Respondent in this Court, it was for the first time attempted to sustain the jurisdiction of the Circuit Court, on the ground that the present proceeding was ancillary to the original suit of Fisher *vs.* School Board; the case was conducted in the two courts *a qua* upon the theory that federal jurisdiction was found solely in the diverse citizenship of the parties.

It is quite clear, however, that the present suit is in no

sense auxiliary or supplemental to the former litigation, in such sense, as to make it an incident or continuation thereof; we have here a new defendant, the City of New Orleans, a stranger to the original record, between whom and Respondent there is raised new issues, forming no part of the original controversy with the School Board, and which in point of fact could find no place in the first suit, which was based upon entirely different and independent grounds, met by defenses which would be wholly irrelevant here, and closed by a judgment or decree which determined nothing as to the present defendant; all issues found in the present record were left at large, were in fact touched at no point by the original decree.

In a case of this character it should appear from the averments of Respondent's bill, that the matters exploited, had already been litigated in the Circuit Court by the same parties, otherwise there would be no jurisdiction.

Garland & Ralston's Federal Practice, s. 132, p. 172.

Respondent seeks here to provoke new issues, to be litigated and adjudged, and to bind by new proceedings, a party unknown to the original record; this suit cannot be considered as necessarily ancillary to, or as a mode of relief inseparably connected with the other suit; it involves the investigation of a new case, arising upon new facts, and is directed against a party not joined in the original action, or bound by the decree therein rendered, in the same manner and to the same extent as the defendant therein; the present defendant, the City of New Orleans, raises here no issue which was mooted or adjudicated upon, in the other suit which was directed against the School Board alone;

the issues here are new and original, and not only did not, but could not, have formed any part of the matters contested or determined in the former suit; the presence of the City of New Orleans as a defendant in the original action, would have been absolutely necessary to have created this condition; the School Board was sued in the first case, and judgment was rendered against it alone; whether or not the City was indebted to the Board, and if it were, what was the measure of Respondent's rights, growing out of such fact were left open, as questions undecided by the original decree, and of necessity, could not be adjudicated upon, save in an original, separate and independent suit, to which the City was made, as she is here, a party defendant; the present proceeding is not merely a mode of execution or relief by which the Respondent is to enforce the former decree in favor of his deceased wife; it is an independent controversy, with a new and a different party, for the purposes of ascertaining whether such conditions exist, as make it liable to Respondent, for the collection of the debt which he claims; the City, here, is entitled to make special and independent defenses regarding itself; and the right to do so is in no respect diminished or controlled by the former decree in which the School Board was cast.

There are adjudicated cases in the federal courts, which maintain the principles contended by defendant as governing the present controversy.

In Anglo-Florida *vs.* McKibbon, 65 Fed. Rep., 529, complainant obtained a judgment decreeing him to be a partner of certain persons in certain lands. By supplemental bill he endeavored to annul conveyances of the lands in which he was decreed to have an interest, alien-

ated by his partner, making the purchasers of the property defendants. It will be seen that the proceeding was to give the former decree its full effect and to secure to complainant the benefit of his title thereby established. The defendants in the supplemental bill were citizens of the same State as complainant, and on demurrer to the jurisdiction, it was held by the Court of Appeals of the Fifth Circuit that the case fell within no rule applicable to supplementary bills as concerned a defendant of the same citizenship of complainant; that new defendants were brought in, and new matter charged as a basis and ground of relief which was not litigated in the first suit, by the same parties, standing in the same interests.

In Lackawanna Coal & Iron Company *vs.* Bates, 56 Fed. Rep., p. 734, it was held by the Circuit Court for the Western District of Missouri, Philips, Judge, that a proceeding under a state statute, to hold a stockholder upon a judgment against a corporation, upon which there had been a return of *nulla bona*, was removable from the state to a federal court, because it was a suit within the meaning of the judiciary, and not ancillary to or in aid of the execution of the first judgment, and could not be regarded as a continuation of the proceeding on the latter; that the proceeding against the stockholder was an independent suit, and not a mere sequence or dependency as a means of enforcing the judgment against the corporation, the state court having held such to be the proper construction of the state statute; it was also held by the latter court, that the process was in the nature of a suit in equity to reach assets in the hands of a third person, and was an independent original action, to be treated independently of the cause

against the corporation, with the right of trial, appeal and writ of error, as in any other action at law.

The Circuit Court asks, why should not the defendant, called into court by process to litigate the question as to whether or not he is a stockholder, and the extent of his liability, be entitled to his constitutional right as a non-resident to have his cause tried in the federal court?

In Boyd, Administrator, *vs.* Braddish *et al.*, 10 Fed. Rep., 406, in the Circuit Court for the District of Iowa, the plaintiff, a citizen of Wisconsin, obtained in the State Court a judgment against an Iowa corporation, and having failed to obtain satisfaction of the judgment, proceeded against the defendant, a stockholder in the corporation, under the Iowa statute, which made the shareholder liable for corporate debts under certain conditions; the defendant sought to remove the case from the State to the Federal Court; he was opposed on the ground that the proceeding was supplemental to the original suit, of which it was a mere mode of execution or relief, inseparably connected with the original judgment; but it was held that the process was not a mere mode of execution or relief, but involved an independent controversy, with a new or different party; that it did not aim to reach assets of the corporation in the hands of a stockholder; that it sought no relief which was inseparably connected with the judgment against the corporation; that the petition charged certain fraudulent acts against the stockholders; which under the statute made them liable for the judgment; that this was a distinct and independent cause of action; that the plaintiff's allegations were founded upon facts which he claimed brought him within the terms of the statute;

that it might have been necessary for him to set out the judgment, and to show that an execution had been unsatisfied, to meet the conditions of the statute, but that the judgment was not the foundation of his action; that he had a controversy with new parties, distinct from that upon which the judgment was rendered; that he sought to establish a new liability against these new parties.

The application of this case to the present controversy is direct. There the remedy for the enforcement of the judgment depended upon the necessary conditions under the statute to make out a cause of liability of a person no party to the original judgment. It was not a process to reach property or assets belonging to the original debtor, but to enforce the judgment against a third party, under the terms of a statute, upon a distinct and independent cause of action which it gave.

If, in the cited case, a proceeding to obtain satisfaction of a judgment by a person no party to it, under the provisions of a statute, is not an ancillary proceeding a mere accessory to the original judgment, but a distinct and independent cause of action, and hence removable from the State to the Federal Court, the present case, which conforms to all of these conditions, should be considered the same.

In Pettus *vs.* Georgia, etc., R. R., 3 Woods, 620 (Case 11,048, Vol. 19, Federal Cases, p. 396 *et seq.*), plaintiff and others brought suit to enforce a lien on certain railroad property; the lien was established by final decree; whereupon the purchasers of the railroad property bought up the claims of complainants, and other claims entitled to the benefit of the decree; counsel for complainants receiving no compensation for their services; whereupon they

filed their petition, entitled of the original cause, in the Court, which had rendered the decree in the original cause, against the purchasers of the property, to establish a lien on the latter for their fee, the defendants sought to remove this proceeding to the Federal Court, but were resisted on the ground that it was a mere incidental proceeding, and appendage or graft upon a suit still pending in the State Court; it was held by Judge Woods that there were here all the elements of an original bill in equity; that the case might have been brought as an independent suit; that it has its origin in the original case, but was not a part of it, or dependent on it; that it was a suit in equity between new parties, on a new cause of action, and consequently was removable.

An ancillary proceeding in the federal court has been determined as equivalent to a supplemental bill; a supplemental bill can be brought only where the subject-matter and the parties are the same in both proceedings.

Root *vs.* Woolworth, 150 U. S., 411.

Where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind, on a different principle, the latter being the province of a bill of review.

Story's Equity Proceedings, 9th Ed., par. 338.

See also Mexican Ore Co. *vs.* Mexican Guadalupe Co., 42 Fed. Rep., 351.

In Bondurant *vs.* Watson, 103 U. S., 286 *et seq.*, plaintiff enjoined the execution of the judgment as concerned

certain property which belonged to him; it was contended that the injunction suit was merely ancillary and incidental to the one in which the judgment had been obtained, and hence not removable from the State court to the Federal Court; in disposing of this contention the Court said that the case removed had all the elements of a suit in equity; when transferred to the Circuit Court an answer and replication were filed, testimony was taken, and a decree made upon final hearing according to equity practice; the original cause to which the plaintiff in injunction was no party, had been ended by a final judgment; that the injunction suit had its origin in that judgment, but was a new and independent suit between other parties, and upon new issues; it was a suit in which the plaintiff sought to be protected against a judgment to which he was not a party, by which his property had been specially condemned to be sold to satisfy a claim against others, and not against him.

These authorities would seem to settle beyond question, that the present suit, raising, as it does, new and original issues, against a new defendant, for the purpose of obtaining relief of a special character, in nowise definable as the execution of a judgment as ordinarily understood, is an independent original action.

In no event, however, could the ancillary jurisdiction of the Circuit Court be invoked further than to obtain the exercise of its powers, for the enforcement of its own judgment; the Complainant sets out in her bill, (Record, p. 1), that she seeks to obtain the execution of three certain judgments in her favor against the School Board; that one of these judgments was rendered in the Circuit Court and the other two by the Civil District Court for the Parish of Orleans, a

tribunal of the State of Louisiana; as to these two latter judgments there could be no ancillary jurisdiction in the Circuit Court; so that should all the contentions of defendant, upon this branch of the case, be met with an adverse conclusion, there would still be no power in the Circuit Court to execute the two judgments of the state court, or to admit them to the benefits of the decree herein.

II.

But, should the Court be of opinion that this suit is auxiliary, or ancillary, to Fisher *vs.* the School Board, then the same defect of jurisdiction which is set up in the present matter is equally applicable to the former case; it may be asked, whether this court can, at this time, inquire into the jurisdiction in the former case, to which, however, it may be replied, that wherever a party seeks the aid of a court of equity to enforce either a judgment at law, or a decree in equity, he does so, at the risk of being called upon to maintain, the validity of the judgment or decree which he thus seeks to enforce; this seems to have been affirmed by your Honors, at least on two different occasions.

Lawrence Mfg. Co. *vs.* Janesville Mills, 138 U. S., 552.
Gay *vs.* Parpart, 106 U. S., 679.

See also opinion of the Supreme Court of Illinois in the last-mentioned case, reported as Wadhaus *vs.* Gay, 73 Ill. Reports, 415; also Daniels' Chancery Pleading and Practice, 6th American edition, top paging 1586, especially note (*a*); 50 N. J. Equity, 97.

It is shown by the record that Mrs. Fisher, the original

complainant and alleged creditor of the School Board, was a native of Virginia; that at an early age she removed to the City of New Orleans, where she resided for a period of thirty-eight years, up to her death; that her husband, John Fisher, appearing now as the natural tutor or guardian of his children, the issue of his marriage with his said wife, claimed first to have been a subject of the King of Spain, but upon second thought, concluded that he was a British subject; Mrs. Fisher did not by her marriage necessarily cease to be a citizen of the United States, or of the state in which she resided.

Morse on Citizenship, pp. 139, 142, 144.

A citizen, in the sense of the judiciary acts, is one who resides in, and is an inhabitant of, the state in question; in any event one who has resided in a state for a considerable time may be considered a citizen thereof.

Shelton *vs.* Tiffin, 6 How., 163.

There is sufficient in the record to show, that at the time and during the pendency of Mrs. Fisher's suit against the School Board, she was a citizen of Louisiana, and therefore incompetent to maintain in the Circuit Court a suit against the School Board, a corporation created by the laws of, and domiciled in the same state; if such be the fact, and it is abundantly shown by the record there was no jurisdiction of the original case; that your Honors are at liberty to notice this fact, and in your discretion act upon it, we think is demonstrated by the authorities above cited; the Court may inquire into the status and condition of the parties to the original record, and refuse its aid in the execution of the

former decree, if it is deemed proper to do so; especially, if the question had been before it originally, it would not have made the decree which is sought to execute.

See Lawrence Mfg. Co. *v.* Janesville, and Gay *v.* Parpart, above cited.

III.

A striking feature of the instance case, is the effort of the plaintiff to show an indebtedness of the City to the School Board, which is denied not only by the asserted debtor, but likewise by its supposed creditor, the School Board; the latter in its answer (see Record, p. 17) expressly denies any indebtedness to it by the City; this, however, is of less importance than the original plaintiff's own conduct with reference to the subject-matter of the present controversy, by which she herself has in effect affirmed that all indebtedness by the City to the Board, had been discharged, long prior to the institution of the present suit. It will be seen (Record, p. 103 *et seq.*) that in 1894 Mrs. Fisher upon one of the judgments upon which the present decree in her favor is founded, proceeded by way of garnishment process against the City, as the supposed debtor of her judgment debtor, the School Board; the answers of the City to the interrogatories in garnishment, (see Record, p. 106), disclosed that she owed the School Board $1,893.09; that this sum was received by Mrs. Fisher as showing the full measure of the indebtedness due by the City to the Board; the answers of the garnishee were never traversed but on the contrary acquiesced in and affirmed to be true by the acceptance by Mrs. Fisher of

the sum of money which they disclosed being due to the School Board; under Act No. 27 (Acts 1877, p. 45) of the General Assembly of Louisiana, for the year 1877, a party who under a writ of execution, proceeds against a third person as garnishee, has only twenty judicial days, within which to traverse or contradict the answers of the latter; no attempt was made by Mrs. Fisher to show that the City was indebted to the School Board in a larger sum than was disclosed by her answers; her procedure was the reverse of this; she accepted without question the indebtedness of the City as being $1,893.09, and no more; the failure to contradict the City's answers, closed all question as to the amount which she may have owed the School Board on July 26th, 1894, the date when her answers were filed in Court (Record, page 106); there is nothiug here to show what, if any, indebtedness arose subsequent to that date; surely nothing which has the faintest tendency to show that subsequent to July 26th, 1894, the City became the debtor of the enormous sum of money for which she is cast by the judgment in the Court below.

The city retained the interest on the school taxes, with the consent and approval of the School Board; this course was concurred in for years; plaintiff should not be permitted to set aside, the settlement of the taxes, thus effected, especially in the absence of any charge of fraud or collusion.

Respectfully submitted.

BRANCH K. MILLER,
JAMES J. MCLOUGHLIN,
Solicitors for City of New Orleans.

No. 281. 46

Answer to motion for Bond.

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Filed Nov. 14, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 281.

THE CITY OF NEW ORLEANS, PETITIONER,

vs.

JOHN FISHER, TUTOR, ETC., ET AL.

Opposition to Motion of Respondents for the Furnishing of a Bond.

SAMUEL L. GILMORE,
City Attorney,
JAMES J. McLAUGHLIN,
BRANCH K. MILLER,
Solicitors for Petitioner.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 11-14-'99

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 281.

CITY OF NEW ORLEANS, PETITIONER,

versus

JOHN FISHER ET AL.

Certiorari to the Court of Appeals for the Fifth Circuit.

Now comes The City of New Orleans, petitioner, and opposes the motion of respondents for the furnishing of a bond in the sum of one hundred and fifty dollars, made November 13th, 1899, on the following grounds, to wit:

First. That respondents have proceeded to the execution of the decree of the circuit court in this cause by the only mode in which the execution of the same can be enforced, namely, by mandamus against the Board of Liquidation of the City Debt, to compel it to sell constitutional bonds, under the terms of the acts of the General Assembly of the State of Louisiana, No. 67 of 1884 and 110 of 1890; that from a judgment of the circuit court making said mandamus peremptory for the sum of seventy-one thousand nine hundred and thirty-eight

and $\frac{78}{100}$ dollars, the said Board of Liquidation has carried the said judgment, for review, to the court of appeals for the fifth circuit by writ of error, which is still now pending and undetermined, and for which it has furnished a bond in said circuit court for the sum of eighty thousand dollars.

All of which is more fully shown by a duly certified copy of the order granting said writ of error, of the said bond so furnished, and the certificate of the clerk of the said court of appeals to the effect that the said writ of error is still pending and undecided in the said court.

Second. That there is no law or rule of practice which requires the petitioner in a proceeding in certiorari to furnish any bond for the granting of such a writ; that if the court should deem that it may, in its discretion, order the furnishing of said bond, this case is not one in which such discretion should be so exercised.

Third. That respondents have resorted to act No. 110 of the General Assembly of the State of Louisiana of 1890 for the enforcement of the decree herein in their favor; that they conceive themselves entitled to compel the sale of a sufficient number of constitutional bonds issued under said act No. 110 of 1890 to pay and satisfy the said decree; that although the Board of Liquidation of the City Debt has resisted the petition for a mandamus aforesaid to compel it to sell constitutional bonds for such purpose, on the ground principally that the decree in favor of defendants has no standing under said statute, respondents having proceeded under said act, should they be entitled to any relief afforded by it, there remain unissued a number of bonds more than sufficient to pay and satisfy the said decree.

All as is more fully shown by the affidavit of the secretary of the said board, to the effect that out of the maximum issue of ten million dollars of bonds authorized by the said act, only nine millions eight thousand five hundred dollars have been issued, and there at present remain unissued nine

hundred and ninety-one thousand five hundred dollars of said bonds; which statement is filed herewith as part hereof.

SAMUEL L. GILMORE,
City Attorney,

JAMES J. MCLAUGHLIN,

BRANCH K. MILLER,
Solicitors for Petitioner.

STATE OF LOUISIANA, }
Parish of Orleans. }

Personally came and appeared Terence Wolfe, Jr., who, being duly sworn, deposes and says:

That he is the secretary of the Board of Liquidation of the City Debt; that he has personal knowledge of the amount of constitutional bonds authorized by act No. 110 of the General Assembly of the State of Louisiana of 1890; that all bonds issued are delivered by affiant, for the said board, to the parties entitled to receive them; that of the ten million dollars of bonds authorized by the said act, only nine millions eight thousand five hundred dollars have been so far issued, and there remain unissued at present nine hundred and ninety-one thousand five hundred dollars of said bonds.

T. WOLFE, JR.

Sworn to and subscribed before me on this 10th day of November, A. D. 1899.

J. C. HENRIQUES,
[SEAL.] *Notary Public.*

[Endorsed:] Original. Supreme Court of the United States, October term, 1899. No. —. City of New Orleans, petitioner, *versus* John Fisher *et al.* Certiorari to the court of appeals for the fifth circuit. Branch K. Miller, notary.

Know all men by these presents that we, The Board of Liquidation of the City Debt, as principal, and The American Surety Company of New York, a corporation created by the laws of New York, as surety, are held and firmly bound unto John Fisher, tutor of his minor children, John B. Fisher, James M. Fisher, William G. Fisher, and R. B. Fisher; U. Koen and U. Koen & Company, F. J. Gasquet, Mary Quinlan, Jean Pomes, G. T. Young, Mrs. Mary Fortier, Mrs. A. B. Gage, and E. F. Duclaux in the full and just sum of eighty thousand dollars, to be paid to the said John Fisher, tutor of said minors; U. Koen and U. Koen & Company, F. J. Gasquet, Mary Quinlan, Jean Pomes, G. T. Young, Mrs. Mary Fortier, Mrs. A. B. Gage, and E. F. Duclaux, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of June, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a circuit court of the United States for the fifth circuit and eastern district of Louisiana, in a suit depending in said court between said John Fisher, tutor of his minor children, John B. Fisher, James M. Fisher, William G. Fisher, and R. B. Fisher, and U. Koen and U. Koen & Company, F. J. Gasquet, Mary Quinlan, Jean Pomes, G. T. Young, Mrs. Mary Fortier, Mrs. A. B. Gage, and E. F. Duclaux, relators, and The Board of Liquidation of the City Debt, defendant, a judgment was rendered against the said Board of Liquidation, defendant, and the said Board of Liquidation of the City Debt having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John Fisher, tutor of his said minor children, and U. Koen, U. Koen & Company, F. J. Gasquet, Mary Quinlan, Jean Pomes, G. T. Young, Mrs.

Mary Fortier, Mrs. A. B. Gage, and E. F. Duclaux, citing and admonishing them to be and appear before the United States court of appeals for the fifth circuit, to be holden at New Orleans, Louisiana, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Board of Liquidation of the City Debt shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE BOARD OF LIQUIDATION OF THE CITY DEBT,
By R. M. WALMSLEY, *Pres't.* [SEAL.]
AMERICAN SURETY CO. OF NEW YORK,
By A. A. MAGINNIS, [SEAL.]
1st Res't Vice-President.
PETER F. PESCUD, [SEAL.]
Res't Ass't Sec'y.

Sealed and delivered in presence of—
—— ——.

This bond approved, to act as a supersedeas.
(Signed) CHARLES PARLANGE, *U. S. Judge.*

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans, State of Louisiana, this 10th day of November, A. D. 1899.

[SEAL.] E. R. HUNT, *Clerk,*
By H. J. CARTER, *Deputy Clerk.*

[Endorsed:] No. 12740. U. S. *ex rel.* John Fisher *et als. vs.* Board of Liquidation of City Debt. Bond.

UNITED STATES CIRCUIT COURT, FIFTH CIRCUIT, EASTERN DISTRICT OF LOUISIANA.

UNITED STATES *ex Rel.* JOHN FISHER, *Tutor*, *et als.*
vs.
BOARD OF LIQUIDATION CITY DEBT. } No. 12740.

On this 24th day of June, 1898, came the defendant, by its attorney, and filed herein and presented to the court its petition praying for the allowance of the writ of error intended to be urged by it; also that a transcript of the proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States circuit court of appeals for the fifth judicial circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error, returnable in thirty days, upon defendant giving bond, according to law, in the sum of eighty thousand dollars, which shall operate as a supersedeas bond.

Done in open court June 24th, 1898.

(Signed) CHARLES PARLANGE,
U. S. Judge.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

Witness my hand and seal of said court, at the city of New Orleans, La., this 10th day of November, A. D. 1899.

[SEAL.] E. R. HUNT, *Clerk*,
By H. J. CARTER.

[Endorsed:] No. 12740. U. S. circuit court, eastern district of Louisiana. United States *ex rel.* John Fisher, tutor, *et als. vs.* Board of Liquidation City Debt. Copy of order allowing writ of error.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH JUDICIAL CIRCUIT.

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that cause No. 746, wherein The Board of Liquidation of the City Debt of New Orleans is plaintiff in error and The United States *ex rel.* John Fisher, tutor, *et als.* are defendants in error, said cause having been brought into the United States circuit court of appeals for the fifth circuit on writ of error to the United States circuit court for the eastern district of Louisiana, is still pending and undetermined in said United States circuit court of appeals.

I do further certify that, as appears from the records of my office, said cause was numbered in said circuit court No. 12740.

In testimony whereof I hereby subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this the 10th day of November, A. D. 1899.

[SEAL.] J. M. McKEE.
Clerk of U. S. Circuit Court of Appeals,
Fifth Circuit.

No. 806. 1898. 46

Brf. of Louque & McCaleb for Resp't.

Filed May 3, 1899.

Clerk Supreme Court U. S.
FILED
MAY 3 1899
JAMES H. McKENNEY,
Clerk.

IN THE UNITED STATES SUPREME COURT

No. 806

EX-PARTE, THE CITY OF NEW ORLEANS, PRAYING FOR A WRIT OF CERTIORARI.

CHS. LOUQUE,
E. HOWARD McCALEB,
Of Counsel.

Filed.....1899.

.....

Clerk.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES.

EX-PARTE, THE CITY OF NEW ORLEANS, PRAYING FOR A WRIT OF CERTIORARI.

No. ....

Taking notice of the application made by the City of New Orleans for a writ of certiorari, John Fisher, Tutor, et als., complainant, and the intervenors in the equity suit against the City of New Orleans, No. 747, of the U. S. Circuit Court of Appeals, Fifth Circuit, respectfully aver:

I.

That the first complaint made by the City of New Orleans is that inasmuch as she chose in her sworn answer to an ancillary bill against her, for an account, to affirm the jurisdiction of the Circuit Court, instead of putting it at issue, she is entitled to a certiorari to review the refusal of the chancellor to allow her so to do, after replication and after the filing by her, of exceptions to the master's report.

The facts are as follows:

Mrs. M. M. Fisher, complainant's wife, filed a suit at law against the Board of School Directors of the City schools of New Orleans, in the Circuit Court of the United States for the Eastern District of Louisiana, based on a judgment recovered by her in the State Court and affirmed by the Supreme Court of Louisiana; see 44 La. A. 184, Fisher vs. Board of School Directors, et als.

The defendant filed an exception to the jurisdiction of the Court on the ground that the school warrants proceeded on were assigned to plaintiff and that the assignors were citizens of Louisiana, naming each particular person who were transferers.

The defendant further averred that said claims formed the basis of the judgment sued on. This exception was filed on the 5th of March, 1892.

Then the CITY OF NEW ORLEANS VOLUNTARILY made herself a party to said suit, and also pleaded to the jurisdiction of the Court, on the ground that the plaintiff was not the owner of the judgment sued on, and that the owners were citizens of Louisiana. Circuit Court Rec. p. 112.

These exceptions were submitted to a jury and their verdict was in favor of plaintiff.

The Court charged the jury that the choses in action sued upon were merged in the judgment forming the basis of the proceedings, and that full faith and effect must be given to the judgment.

Defendant took a bill of exception to the ruling of the Court excluding evidence to contradict the judgment of the State Court. This exception of the city of the jurisdiction of the Court was filed March 12th, 1892. The verdict was rendered March 26th, 1892, and judgment regularly entered up thereon. The defendant, the Board of Directors of the City Schools, filed their answer on the 10th of May, 1892. The verdict of the jury and judgment on the merits were in favor of plaintiff May 19th, 1892. The record showing the above facts, duly certified, is made part of this appearance. The same is also found in the printed record of the Circuit Court of Appeals at pages 55 to 60 and p. 112.

The City of New Orleans and the Board of School Directors allowed this judgment to become final.

Four years after the rendition of this judgment Mrs. Fisher filed her bill against the City of New Orleans and the School Board, in which she averred: "That the school taxes out of which said judgments have been made payable is a trust fund, levied by the City of New Orleans, for the purpose of paying the expenses of the Public Schools of New Orleans." "That the Board of School Directors to whom the City of New Orleans should account have refused to demand such an account and will continue to do so, and your oratrix would be left without a remedy." Cir. Court Rec., p. 1 et seq.

She prayed for an account of the school taxes levied and collected by the City of New Orleans, for the benefit of complainant and the creditors of the School Board.

The City of New Orleans then filed its sworn answer as fol-

lows: "1st. Defendant admits that oratrix recovered judgments against the Board of School Directors, a corporation of the State of Louisiana and citizen thereof, both in this Honorable Court and in the Civil District Court for the Parish of Orleans, as is set forth in oratrix's bill of complaint and records annexed thereto and referred to therein. 2nd. Defendant admits that all of said judgments are now final and are payable as decreed and provided for in said judgments." Cir. Court Rec. p. 11-12.

The School Board answered: "That it is true oratrix recovered judgments against respondent in this Hon. Court, as stated in her bills of complaint herein, which said judgments are final and executory as decreed therein." Cir. Court Rec., p. 18.

The Board then joined the city in her defenses to defeat the complainant.

The complainant's replication was duly filed. The city was ordered to render an account of the school taxes collected by her, and Mr. E. D. Saunders was appointed master.

The complainant and the City of New Orleans appointed two experts, who separately examined the city's account and arrived practically at the same result. The master adopted the report of the city's expert and found that the city HAD COLLECTED AND RECEIVED SCHOOL TAXES TO THE AMOUNT OF $71,938.78. C. C. Rec., p. 25.

The report was filed and the city made a single exception to the master's report, i. e., "that the interest collected by the city on delinquent taxes does not follow the taxes and does not belong to the party to whom the taxes belong." C. C. Rec., p. 36.

This exception was filed June 7th, 1897. Up to this time the proceedings were carried on according to the equity rules.

At this stage the attorneys of the city became convinced that there was no escape from the liability of the city; therefore, without regard to the fact that the city was a party to the original suit and trial before the jury whose verdict maintained the jurisdiction of the Court, and that this equity proceeding was only ancillary to the original law case against the School Board and that both defendants had admitted the validity and finality of said judgment in their answers, filed without leave of Court, an exception and also a plea to the jurisdiction. C. C. Rec. p. 40.

They sought to again put at issue a question which had been

finally and forever closed, by a judgment from which no writ of error has or can be prosecuted.

On motion of solicitor for complainant these two papers were ordered stricken from the files.

On Dec. 20th/97 solicitors for the City of New Orleans asked permission to file a plea to the jurisdiction, regular in form but the permission was refused.

The Circuit Court rendered a decree in favor of complainant and the City of New Orleans appealed.

The Circuit Court of Appeals, in passing on the eighth assignment of errors which complained of the above action of the Judge said: "These documents had no proper place in the files of the Court. At the same time it is to be noticed that the right to file pleadings, after the pleadings have been regularly made, under the rules, is a matter within the discretion of the chancellor, and not subject to review. Another serious objection to these alleged pleas is that, in so far as they attack the jurisdiction of the Court in the original suit in the Circuit Court in which Mrs. Fisher recovered a judgment against the City School Board, and which is the basis of this creditor's bill, it seems clear to us that the pleas are objectionable. Mattingly vs. Nye, 8 Wall. 370." The decision of the Circuit Court of Appeals is reported in 91 Fed. Rep., p. 584.

The question of jurisdiction, nearly five years before, had been passed upon by a jury contradictorily with the City of New Orleans herself and was res adjudicata.

The verdict of a jury on a question of fact, whether the owner of the judgment was a citizen of Louisiana, could not be re-examined in the ancillary suit filed in equity to enforce the judgment.

This judgment could not be attacked collaterally under any circumstance. 156 U. S. 527-533, Evers vs. Watson; 123 U. S. 555, Demoines vs. Homestead.

It is stated in petitioner's brief that in the ancillary suit defendant could attack the jurisdiction in the primary suit, and two decisions of the Court are cited in support of this statement; 138 U. S. 552-561; 106 U. S. 679.

These two cases affirm that when a decree has been entered by consent and afterwards one of the parties applies to the Court to enforce the decree, the Court will look into the decree and will correct it, if found erroneous. The reason given is that the de-

cree was only the execution of a contract and not the decision of a Judge ?

It is also stated that this chancery suit is not an ancillary proceeding, but the following authorities show that it is:

8 Peters 1, Dunn vs. Clark.

24 How. 460, Freeman vs. Howe.

2 Wall. 609.

110 U. S. 276.

111 U. S. 522, Pacific vs. Missouri R. R. Co.

123 U. S. 329, Dewey vs. Gas Co.

When we come to the ordinary rules of pleadings one find that an answer admits citizenship. It is too late afterwards to plead that fact.

116 U. S. 588; 134 U. S. 250; 21 How. 214; 161, U. S. 356.

No judgment rendered by a Circuit Court of the United States is an absolute nullity.

156 U. S. 527, Evers vs. Watson.

123 U. S. 555, Desmoines vs. Homestead.

But if the case were on trial at this juncture, on the question of jurisdiction and taking for true all that petitioner avers, it would appear that Miss Blackadder, born in Virginia, became a citizen of Louisiana and was married to John Fisher, an Englishman, who was called to Cuba a great part of his time. The result would be that Mrs. Fisher became an English woman and an alien. This view is supported by the learned decision rendered by Justice Brown in the case of Pequinot vs. City of Detroit. 16 Fed. Rep. 211.

Her suit was filed and judgment obtained in 1892. The subsequent declaration of Mr. Fisher in 1896 to become a naturalized citizen did not oust the Circuit Court of its jurisdiction. Besides, John Fisher still remained an alien after his declaration for the purposes of jurisdiction, for a declaration of intention is not equivalent to naturalization.

3d. Wallace, Jr., Baird vs. Byrne, case No. 757, Federal Cases.

In any view, this complaint is not well founded. This whole controversy arises by reason of the chronic unwillingness of the City of New Orleans to meet and pay her just obligations.

The petitioner seems to pin her faith on Section 5 of the Act of 1875, quoted at p. 3 of her brief.

The act says that the Circuit Court shall proceed no further,

but shall dismiss the suit at any time, it shall appear to the Court that parties have been collusively made. After judgment the suit cannot be dismissed; therefore, the statute applies to any cause arising before judgment and when the Court can still dismiss the suit.

After judgment the statute does not apply.

But the City of New Orleans can only blame herself if she has not made the issue, and this Court cannot relieve her of her voluntary acts.

II.

The next ground of complaint is that the Court of Appeals erred in allowing interest on the decree, because complainant sought to realize on her judgment before taking her cross appeal. In other words, a plea of estoppel is urged against complainant.

If this ground were true, no such estoppel has ever been maintained in the Courts of the United States.

"In no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree.

If the judgment is reversed it is the duty of the Court to restore the parties to their rights."

7 How. 184.

3 Wall. 688, United States vs. Dashiel.

107 U. S. 8, Embry vs. Palmer.

93 U. S. 154, O'Hara vs. McConnell.

But this ground is not true. The decree, as originally rendered on Febv. 28, '98, allowed interest from January 24th, 1881. Rec. Cir. Ct., p. 124.

On the 28th of April the chancellor refused the rehearing prayed for by the city, but ex proprio motu, ordered the final decree of February 21st, 1898 to be amended so as to allow interest on the amount recovered from February 21st, 1898, instead of January 24th, 1881. He instructed "the clerk to note this amendment on the margin of said decree." Rec. 145-146.

Complainant and intervenors applied for a writ of mandamus against the Board of Liquidation to pay or fund the decree as amended. They, as usual, refused, and the writ was subsequently granted by the Circuit Court.

Your Honors will notice that under any circumstance the

least amount the city could be called upon to pay was the amount of the decree as amended; and complainant and relator did not do anything contrary to and in opposition to their rights to claim more. However, after the writ of mandamus was granted, the city then took an appeal from the decree in the chancery suit, not to act as a supersedeas. The Board of Liquidation took a writ of error from the judgment allowing the mandamus, to act as a supersedeas. The complainant and intervenors took a cross-appeal from the order of April 28th, 1898, not from the original decree. See petition for cross-appeal.

The complainant has realized nothing from the decree and has given the city no discharge. How can complainant be estopped?

The Court of appeals in a learned opinion allowed the interest on the decree which now remains as it was originally rendered.

Strange as it may seem, the City of New Orleans, applicant herein, does not in her brief set out a single reason why she should not pay interest and why the judgment of the Circuit Court of Appeals is erroneous on this subject. She alleges neither error nor injury.

The facts show that the city collected the school tax continuously from 1871 to 1881; retained the amount collected, and used it for her own purposes.

She is allowed the use of these funds for ten years, free of interest, and it was only when the city's expert closed his report on January 24th, 1881, that the interest commenced to run under the decree.

The city was an unfaithful trustee. She spoliated the trust funds belonging to complainant and intervenors, the cestui que trustent, and under the equity jurisprudence could have been condemned to pay the highest conventional interest, with a rest every six months. But if it be true that complainant can be estopped, is not the same doctrine applicable to the City of New Orleans? She was cited to answer the cross-appeal, and she appeared and contested the matter on its merits. It is too late after judgment to complain and urge that the appeal should have been dismissed.

The city expects this Honorable Court to issue a writ of certiorari to review the judgment of the Circuit Court of Appeals on a point which was not raised before that Court and which was not decided there.

III.

The third ground of complainant is that the Court erred in allowing to complainant the interest collected by the city on delinquent taxes.

Act No. 175 of 1859, Sec. 5, provides:

"That all city tax bills shall bear ten per cent interest from the first Monday of July of the year in which they are payable:"

Under this law the city collected on the school tax, interest, penalties or whatever it can be called, $48,758.75.

The question was decided by the master in a few words: "It is a question of law whether the school board is entitled to any part of the interest. I think it is—the interest, as a mere accessory of the principal, belongs, in my opinion, to the same person to whom the principal belongs." Commenting on the above the Circuit Court of Appeals decides: "Under the law, the school taxes carried 10% interest per annum, the day they became delinquent. It was a penalty for non-payment of the taxes. The interest, or penalty, for delayed payment of school taxes, formed no part of the city's proper revenues. The city in collecting the same was acting as a trustee for the school board. Delay in payment of taxes, operated to the prejudice, not of the city, but of the school fund and its creditors. We are unable to find any authority in law or morals, for the city to appropriate to herself this interest. To allow such an appropriation would be to reward the city for its own negligence in the collection of the taxes of the school fund. We fully agree with the master that "the interest, as a mere accessory of the principal, belongs to the same person to whom the principal belongs."

91 Fed. Rep. 583 N. O. vs. Fisher.

If your honors will read the decision rendered by the Circuit Court of Appeals as reported you will be convinced that all the care, attention and learning which can be bestowed on a case has been given by the conscientious and able judges on the bench of the Fifth Circuit. They have done full justice to the City of New Orleans.

This, the single exception and issue, properly raised under the pleadings in this cause is entirely devoid of merit.

IV.

The Court erred in including $11,933 00/100 discount on taxes, in its decree.

This is not true. No discount is included in the decree.

Solicitors for the city re-iterate the same charges here, although they have been shown the law and the facts repeatedly.

In 1874 the Legislature authorized the City of New Orleans to allow a rebate on taxes to all persons who would pay their taxes before they became due. But the city paid over to the School Board the full amount of the taxes collected during that period without rebate.

Mr. Aiken reports to the master: "The books of the City Treasurer show that, although a discount was allowed on all taxes paid before a certain date, the school taxes were paid over to the School Board in full and the city lost the interest on those taxes, charging it to the interest account." R. 31-32.

This was done under the special act above mentioned of 1874, No. 41, p. 78, which reads:

"That hereafter, and including the taxes of 1874, taxes imposed by the City of New Orleans, shall be payable from January 1st to March 31st, and shall be exigible from and after the 31st day of March in each year.

"That the administrators of said city, may, in their discretion and under such regulations as they may make, grant a rebate or discount on taxes paid in full prior to the 20th day of March in each, including the present year; provided, no discount shall be made upon school tax."

How can the city, in the face of this law, claim a discount on the school taxes? This point was not raised in the exception to the master's report and is not properly before the Court.

When we summarize the grounds urged for the writ of certiorari applied for herein, we find that the two grounds first mentioned are based on the fact that the lower Court erred in not deciding points not raised, i. e., first, in not passing on the question of jurisdiction which the city not only failed to put at issue, but a jurisdiction which she affirmed under oath; second: in not maintaining an estoppel not raised on the question of interest claimed on the cross-appeal. To state the propositions to refute them.

The third ground is that the Court erred in ordering the city to refund what she had received for account of complainant, in the shape of penalties or interest on delinquent taxes. The ordinary rules of logic and common honesty refute this proposition.

The last ground is that the Court should have allowed rebates.

The statute of 1874 is a complete answer to this proposition, which was not urged in the exception to the master's report and is and was not properly before the Court.

We have followed the petitioner in her printed brief, and we notice that her counsel in the opening paragraph say that the above four grounds "are sufficient for the purpose of this application," but the concluding paragraph asks this Honorable Court to consider all the grounds which are not mentioned and in support of which no argument is made." * * "They are insisted upon."

This seems a clear admission that the above grounds are not sufficient to obtain the writ.

No case has ever been presented to a Court of Justice where greater violations of rights have been perpetrated. The defendant seeks to excuse her iniquities by a maze of unjust, absurd and illegal propositions, with the evident idea of bewildering the judges.

A suitor should present himself before a Court of Justice with clean hands.

In this case, the City of New Orleans has confessedly in her treasury the money collected from the tax payers, to pay the school teachers who have taught in her public schools.

She has diverted that money to other uses and for more than twenty years she has defied all the efforts of the cestui que trustent to obtain from her a settlement. How can this Honorable Court lend a willing ear to the application of this defaulting and unfaithful trustee and assist her in retaining her wrongful possession and in further oppressing the complainant and intervenors?

Your Honors will perceive from the following decisions the vast amount of litigation presented to enforce such plain rights as are claimed by complainant: Fisher vs. School Board, 44 La. A. 184, U. S. ex rel. Fisher vs. Board of Liquidation, 60 Fed. Rep. 387, Gasquet vs. School Board, 45 La. A. 342, Fisher vs. School Board, 48 La. A. 1077, U. S. ex rel. Fisher vs. Board of Liquidation, 75 Fed. Rep. 543, Fisher vs. City of New Orleans, 91 Fed. Rep. 574.

The application herein made for a writ of certiorari is oppressive and unjust and your Honors are respectfully asked to refuse the writ.

Respectfully submitted,

CHS. LOUQUE,
E. HOWARD McCALEB,
Of Counsel.

UNITED STATES OF AMERICA.

CIRCUIT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF LOUISIANA,

NEW ORLEANS, LOUISIANA.

No. 12,060.

MRS. M. M. FISHER AND HUSBAND

versus

THE BOARD OF DIRECTORS OF THE CITY SCHOOLS OF NEW ORLEANS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 2, 1899.

United States Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER & HUSBAND
vs.
THE BOARD OF DIRECTORS OF THE CITY SCHOOLS OF New Orleans. } No. 12060.

Petition. Filed February 23, 1892.

To the hon. the circuit court of the United States for the eastern district of Louisiana:

The petition of Mrs. M. M. Fisher, born Blackadder, duly authorized and assisted by her husband, M. M. Fisher, who appears herein for said purpose and joins his said wife herein, both citizens of the Kingdom of Spain, and residing in the island of Cuba—

Respectfully represents:

That your petitioners have recovered judgment against the Board of Directors of the City Schools of New Orleans, a corporation duly created under the laws of the State of Louisiana and a citizen of said State, for the sum of eight thousand and ninety-seven $\frac{17}{100}$ dollars, with legal interest from May 22nd, 1890.

That said judgment was rendered in favor of your petitioner and against said defendant by the civil district court for the parish of Orleans, under No. 30262 of the docket of said court.

That your petitioner's claim, which formed the basis of the aforesaid judgment, was for the salary due to petitioner for work actually done as a school teacher of the public schools of the city of New Orleans, and for the salary of other teachers whose claims were transferred to your petitioner, as the whole more fully appears by the certified copies of the petition, answer, and judgment, both of the district court, and offered by the supreme court of Louisiana on appeal.

That said judgment is made payable out of the school tax levied by the city of New Orleans on the assessed property of said city for the year 1878 and previous years.

That, notwithstanding due demand, the defendants refuse to pay.

Whereupon petitioner prays that E. B. Kruttschnitt, president of the board of directors of the city schools of New Orleans, be cited hereto, and after due proceedings be condemned to pay your petitioner the sum of eight thousand and ninety-seven $\frac{17}{100}$ dollars, with 5 % interest per annum from May 22nd, 1890, payable out of the school tax levied by the city of New Orleans prior to 1879; and petitioners pray for general relief, &c.

(Signed) CHARLES LOUQUE, *Att'y.*

Exception. Filed March 5th, 1892.

United States Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER, Authorized and Assisted by Her Husband, M. M. Fisher,
vs.
BOARD OF DIRECTORS OF THE CITY SCHOOLS OF NEW Orleans. } No. 12060.

Now into court comes defendant in the above entitled and numbered case, and for exception to the plaintiff's petition pleads:

First. That the said plaintiff is without capacity to stand in judgment in this case, for this, that whatever interest the said plaintiff may have had therein has been seized and is now in the possession of and the property of the defendant in the case of Mrs. M. M. Fisher, duly authorized by her husband, *versus* The Board of School Directors, No. 30262 of the civil district court of the parish of Orleans; and defendant hereby makes profert of the writ of *fieri facias* in said suit, No. 30262, and the return thereon of the sheriff, and pleads the same and makes the same part of this exception.

Second. That the court is without jurisdiction to hear and determine this case, for this, to wit, that the rights and credits, the school warrants herein proceeded on, are held by the plaintiffs herein under assignments, and that the assignors are all citizens of the State of Louisiana and residents of the city of New Orleans, and therefore without right to sue defendant in this court, defendant being likewise a citizen of the State of Louisiana and likewise a resident of the city of New Orleans, and that it is not competent for Mrs. M. M. Fisher, the plaintiff herein, in her said character of assignee, to sue defendant.

That Miss M. A. McClane is the owner of school certificates transferred and assigned by her to said defendant by means of fourteen different transfers, and that Miss M. A. McClane is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That Miss I. Simmons is the owner of school certificates transferred and assigned by her to plaintiff by means of eleven different transfers, and that Miss I. Simmons is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That Miss S. A. Finch is the owner of school certificates transferred and assigned by her to plaintiff by means of three different transfers, and that Miss A. A. Finch is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That Miss Petard is the owner of school certificates transferred and assigned by her to plaintiff by means of three different transfers, and that Miss Petard is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That Miss M. A. Swatson is the owner of school certificates transferred and assigned by her to plaintiff by means of ten different

transfers, and that Miss M. A. Swatson is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That Misses I. E. O'Brien, Sheehan, Miller, M. A. Hart, and Ducatel are owners of school certificates transferred and assigned by them to plaintiff by means of different transfers, and that they are all citizens of the State of Louisiana and residents of the city of New Orleans.

That Miss S. B. Horton is the owner of school certificates transferred and assigned by her to plaintiff by means of seven different transfers, and that Miss S. B. Horton is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That Miss C. A. Warner is the owner of school certificates transferred and assigned by her to plaintiff by means of three different transfers, and that Miss C. A. Warner is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That Miss M. M. Lowe is the owner of school certificates transferred and assigned by her to plaintiff by means of fifteen different transfers, and that Miss M. M. Lowe is a citizen of the State of Louisiana and a resident of the city of New Orleans.

That said claims so transferred *from* the basis of the judgment herein sued on, and that it is so admitted by plaintiff's petition, and that it also appears by said petition that defendant is a citizen of the State of Louisiana.

Wherefore exceptor prays that said exceptions be maintained and plaintiff's suit herein dismissed with costs.

(Signed) CARLETON HUNT, *Att'y.*

United States Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER ET AL. *vs.* CITY OF NEW ORLEANS. } No. 12060.

Now comes the City of New Orleans and for exception to the plaintiff's petition pleads—

That the plaintiff is not the owner of the judgment herein sued on and cannot sue thereon; that the said judgment is owned by citizens of Louisiana and residents of New Orleans, who have no right to maintain an action herein upon said judgment against defendant, defendant being likewise a citizen of Louisiana, and defendant says that the names of the owners of the said judgment are set forth in the exception previously filed herein, and defendant refers to the same for the names in question.

That the judgment herein proceeded upon sets forth no cause of action.

That no action will lie to enforce the judgment herein sued upon.

That no action upon a judgment will lie in this court except when the same is a foreign judgment in the sense that it has been rendered in another country or State than the State of Louisiana or where the debtor is dead and his estate is under administration

and that the action of plaintiff does not fall within either of said categories.

Whereupon exceptor prays that the said exceptions be maintained and the plaintiffs' suit dismissed with costs.

(Signed) CARLETON HUNT, *City Att'y.*

Verdict on Exceptions to Jurisdiction.

Extract from the Minutes, November Term, 1891.

NEW ORLEANS, SATURDAY, *March 26th*, 1892.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

MRS. M. M. FISHER & HUSBAND
vs.
BOARD OF DIRECTORS OF THE PUBLIC SCHOOLS, CITY of New Orleans. } No. 12060.

This cause, as continued from Saturday, March 19th, 1892, was this day resumed on the exception to the jurisdiction of the court, and the jurors empanneled in the cause, as well as the attorneys for the parties respectively, being all present, the trial was proceeded with.

After receiving a charge from the court the said jury did then and there, in open court, through their said foreman, Geo. B. Penrose, render and deliver the following verdict:

We, the jury, find a verdict for the plaintiffs on the question of jurisdiction and against the defendants on that issue.

GEO. B. PENROSE, *Foreman.*

N. O., March 26, 1892.

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly, and the cause was continued, to be reassigned on motion.

Bill of Exceptions. Filed March 26th, 1892.

United States Circuit Court, Eastern District of Louisiana.

MRS. M. M. FISHER, Authorized, &c.,
vs.
BOARD OF SCHOOL DIRECTORS. } No. 12060.

Be it remembered that on the trial in this case of the exception to the jurisdiction of the court,

Counsel for defendant, The Board of School Directors, said board being a citizen of the State of Louisiana, offered to prove by witnesses, who were duly called and sworn, that the school certificates,

on which the judgment of the civil district court for the parish of Orleans herein proceeded upon is based, were transferred and assigned to plaintiff for the mere purpose of suing by persons who are likewise citizens of the State of Louisiana, and that said certificates are by plaintiff held in trust for said citizens of the State of Louisiana, who could not themselves in their said character have sued defendant in this court.

But on objection to the introduction of any testimony upon that issue, made and raised by counsel for plaintiff, that said certificates were merged in said judgment of the civil district court for the parish of Orleans, the court, considering that the choses in action were merged in the judgment, and that the suit was not to recover the contents of a promissory note or other chose in action but upon the judgment, and that the judgment was conclusive upon the parties as to the ownership of the certificates, upon which it was based, sustained the objection and excluded the testimony.

Wherefore counsel for defendant then and there took this bill of exceptions to the ruling of the court excluding said testimony to prove the assignment and transfer unto plaintiff of said school certificates in trust and in order to sue, and now tenders said bill, which is duly signed and sealed accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

March 26th, 1892.

Judgment.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, November Term, 1891.

NEW ORLEANS, SATURDAY, *March 26th*, 1892.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

MRS. M. M. FISHER and HUSBAND
vs.
THE BOARD OF DIRECTORS OF THE PUBLIC SCHOOLS OF the City of New Orleans. } 12060.

By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged, and decreed that the exception to the jurisdiction of the court herein filed by the defendants be overruled.

Judgment rendered March 26, 1892.
Judgment signed March 31, 1892.

(Signed) EDWARD C. BILLINGS, *Judge.*

Answer. Filed May 10, 1892.

U. S. Circuit Court, East. Dist. of La.

MRS. M. M. FISHER, Authorized, &c., *vs.* BOARD OF SCHOOL DIRECTORS. } No. 12060.

Into this honorable court comes The Board of Directors of the City Schools of New Orleans, and for answer to the demand against them made in part to your honor, and without in any way waiving the exceptions herein already passed upon, denies each and every allegation in the said petition contained, and prays for strict proof thereof, and that the same be dismissed at plaintiff's cost, and for all general relief.

(Signed) E. A. O'SULLIVAN,
City Attorney.

Case Called, Jury Empaneled, Hearing, and Verdict.

Extract from the Minutes, April Term, 1892.

NEW ORLEANS, THURSDAY, *May* 19, 1892.

Court met pursuant to adjournment.
Present: Hon Edward C. Billings, district judge.

MRS. M. M. FISHER *vs.* BOARD OF DIRECTORS OF THE CITY SCHOOLS OF NEW Orleans. } No. 12060.

This cause was called for trial, Charles Louque appearing for plaintiff, E. A. O'Sullivan for the defendants; whereupon the following-named jurors were called and sworn to well and truly try the issue joined herein, to wit:

1. Geo. W. Young,
2. M. F. Wilder,
3. H. M. Nugent,
4. J. C. Aucoin,
5. H. H. Carey,
6. A. L. Lange,
7. Jos. V. Bofill,
8. G. W. Stockton,
9. Chas. A. Anderson,
10. M. Camps,
11. Jac. Vollrath,
12. Wm. Louis,

when the court appointed Geo. W. Young foreman of the said jury, and the trial was proceeded with. After hearing the pleadings, evidence, and instructions of the court and arguments of counsel, the said jury did then and there, in open court, through their said foreman, render and deliver the following verdict, viz:

We, the jury, find a verdict for plaintiff in the sum of eight thousand and ninety-seven $\frac{17}{100}$ dollars, with 5 % interest per annum

from May 22, 1890, payable out of the school tax levied by the city of New Orleans prior to 1879.

GEO. W. YOUNG, *Foreman.*

May 19, 1892.

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

Judgment.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, April Term, 1892.

NEW ORLEANS, THURSDAY, *May* 19, 1892.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

MRS. M. M. FISHER and HUSBAND
vs.
THE BOARD OF DIRECTORS OF THE CITY SCHOOLS OF New Orleans. } 12060.

By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff-, Mrs. M. M. Fisher and her husband, M. M. Fisher, have judgment in *her* favor and against the Board of Directors of the City Schools of New Orleans for the sum of eight thousand and ninety seven $\frac{17}{100}$ dollars, with 5 % interest per annum from May 22, 1890, and costs, payable out of the school tax levied by the city of New Orleans prior to 1879.

Judgment rendered May 19, 1892.
Judgment signed May 24, 1892.

(Signed) EDWARD C. BILLINGS, *Judge.*

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the United States circuit court, eastern district of Louisiana, do hereby certify the foregoing ten and one-half (10½) pages do contain a true copy of the original petition, exceptions of the Board of School Directors, exceptions of the City of New Orleans, hearing and verdict on the exceptions, bill of exceptions of defendant, judgment upon exceptions, answer, hearing and verdict, and judgment, all of which originals are now of record and on file in the archives of this office, in the cause entitled Mrs. M. M. Fisher and Husband *versus* The Board of Directors of the City Schools of New Orleans, and numbered 12060 of the docket of said circuit court.

Witness my hand and seal of said court, at the city of New Orleans, State of Louisiana, this 24th day of April, A. D. 1899.

{ Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La. }

E. R. HUNT, *Clerk*,
By H. J. CARTER, *D'y Clerk*.

[Endorsed:] No. 12060. U. S. circuit court, eastern district of Louisiana. Mrs. M. M. Fisher *et al. vs.* The Board of Directors of the City Schools of New Orleans. Copy of —.

6867

No. 281. 46

Motion for add'l Bond.

Filed Nov. 13, 1899.

SUPREME COURT U. S.
FILED
NOV 13 1899
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

CITY OF NEW ORLEANS

versus No. 281.

JOHN FISHER, TUTOR, & AL.

SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

CITY OF NEW ORLEANS
versus
JOHN FISHER, TUTOR, & AL.

No. 281.

Now comes Charles Louque, Solicitor for Complainant, John Fisher, herein acting as the duly qualified tutor of his minor children, and on suggesting to this Hon. Court that the City of New Orleans, petitioner for a writ of certiorari, has been condemned as trustee to pay to complainant and intervenors herein the sum of seventy-one thousand nine hundred and thirty-eight 78/100 dollars with 5% interest per annum from January 24th, 1881, making a total to date of one hundred and thirty-seven thousand dollars, and on suggesting to the Court that the writ of certiorari herein issued should either act as a supersedeas or not, at the option of petitioner the City of New Orleans, that the Court should for the orderly proceedings and in justice to complainant order the City of New Orleans to furnish a good and solvent bond to guarantee the faithful execution of such judgment as may be rendered by this Hon. Court; or that the complainant and interveners should be allowed to issue execution and collect their judgment in accordance with existing laws during the pendency of the examination of this cause by this Hon. Court;

And on suggesting to the Court that the City of New Orleans has been duly notified that this motion would be presented to this Hon. Court on the 13th day of November, 1899; as appears by the affidavit of service hereto annexed:

Moves the Court for an order that the City of New Orleans do furnish a bond with good and solvent surety, in the sum of one hundred and fifty thousand dollars within fifteen days from this 13th of November, 1899, conditioned for the faithful payment of whatever judgment may be rendered herein; and that this order be notified to said City of New Orleans; in default whereof the writ shall be dismissed with costs.

Affidavit.

Charles Louque being duly sworn says he served a true and corect printed copy of the above rule on the City of New Orleans through the City Attorney in person, on the 20th day of October, 1899.

(Signed) CHS. LOUQUE.

Sworn to and subscribed before me this 20th day of October, 1899. (Signed) F. D. CHARBONNET,

[Seal] Notary Public.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

THE CITY OF NEW ORLEANS, PETITIONER,

versus No. 281

JOHN FISHER, TUTOR, ET AL.

BRIEF ON BEHALF OF JOHN FISHER, ET AIS.

Certiorari to the Circuit Court of Appeals, Fifth Circuit.

Mrs. M. M. Fisher and her husband having sued the Board of School Directors in the State Court of Louisiana, obtained a final judgment against that Board for the sum of $8,097 17-100 with 5 per cent. interest per annum from May 22nd, 1890, payable out of the school tax levied by the City of New Orleans prior to 1879. This judgment was obtained in the year 1890. It was afterwards affirmed by the Supreme Court and is reported in the 44 A. 184. Fisher vs. School Board.

On the 23rd day of February, 1892, Mrs. Fisher and her husband sued the School Board on said judgment, in the Circuit Court of the United States for the Eastern District of Louisiana. R. 48.

This suit was resisted. The School Board on the 5th of March, 1892, under the practice of Louisiana filed an exception to the jurisdiction of the Court. R. 49.

The City of New Orleans also filed an exception to the jurisdiction on the 12th of March, 1892. R. 98.

The matter was submitted to a jury who rendered a verdict in favor of the jurisdiction. R. 51.

The exception of want of jurisdiction was overruled by the Court on the 26th day of March, 1892. R. 51.

The case was then put at issue, was tried on its merits and the jury rendered a verdict in favor of Mrs. M. M. Fisher and her husband. Judgment was accordingly entered on the 19th of May, 1892, for the sum of $8,097 17-100 with 5 per cent. interest from May 22nd, 1890, payable out of the school tax levied by the City of New Orleans prior to 1879. R. 52.

No writ of error was sued out to examine the question of jurisdiction and the judgment was permitted to become final.

The choses in action on which the original suit had been brought in the State Court had been merged in the judgment.

1 La. An. 372 Oakey vs. Murphy; 7 A. 333 Deniston vs. Payne; 12 A. 736; 3 A. 388. 2 N. S. 602; 15 A. 35 Jones vs. Jamison. 120 U. S. 518 Schuler v. Israel.

Black on judgments §674, 677; 11 Fed. Rep. 657; 27 Fed. Rep. 851; 8 Fed. Rep. 303; 14 Fed. Rep. 100-217; 6 Bissell: U. S. vs. Dewey (case 14956, U. S. C. C. reports West Pub. Ed'n.)

Freeman on judgments §221.

6 Wall 231; 17 Wall 545; 21 Wend. 339.

The Circuit Court had jurisdiction to entertain that suit. 93 U. S. 205. Ober vs. Gallagher.

2 Mason 269. Bean vs. Smith (case 1174.)

Black on judgments § § 271-275.

Chief Justice Waite in passing on the question of jurisdiction when a suit is brought on a judgment said: "The note was

no longer in existence as an outstanding liability. It had been merged in the judgment and was as a note, extinguished. Gallagher no longer claims as the assignee of the note, but as the owner of a judgment in his favor against Thompson. He can sue Thompson upon the judgment in the Courts of the United States in Tennessee. As was well said by Mr. Justice Story, in Bean vs. Smith, 2 Mason 269; it is no objection to the jurisdiction that at some anterior period the transaction assumed a shape not within the reach of that jurisdiction. It is sufficient, if it has now become so modified by the act of the parties, or by the principles of law, that jurisdiction now rightfully attaches." Thompson is no longer a debtor by note to Fleming, but by judgment to Gallagher. In the collection of the judgment, Gallagher does not sue or proceed upon the note, and its assignment, but upon the judgment.

"The Court had, therefore, jurisdiction of the suit as originally brought." Having obtained rightful jurisdiction of the parties, and the subject matter of the action, for one purpose, the Court will make its jurisdiction effectual for complete relief. Story's Eq. 64 note K." . 93 U. S. 206. Ober vs. Gallagher. 160 U. S. 645. Gregory vs. Van E. E.

Nearly four years after the rendition of this judgment in favor of Mrs. Fisher and when it had become final and conclusive, Mrs. Fisher and her husband filed their bill against the City of New Orleans and the Board of School Directors. R.1.

The judgment in favor of Mrs. Fisher and against the School Board was rendered on the 19th of May, 1892 (R. 52), and the bill was filed May 11th, 1896. (R. 1.)

The bill avers the recovery of the judgment against the Board of School Directors, that said judgment is final and it is made payable out of the school taxes levied by the City of New Orleans prior to 1879.

That said taxes is a trust fund in the hands of the City of New Orleans, levied by the City of New Orleans, for the purpose of paying the expenses of the public schools.

That the Board of School Directors to whom the City of New Orleans should account, have refused to demand an account of these taxes.

She prayed for an account. R. 1-2 and 3.

The city filed a general demurrer to the bill. R. 5.

The demurrer was overruled. R. 10.

The City of New Orleans filed her answer. R. 11 to 15.

The Board of School Directors also answered. R. 16 to 18.

Among other averments contained in the answer of the Board of School Directors is the following: "That the City of New Orleans has fully, faithfully and promptly accounted for all such appropriations as may have been made by the said city for the benefit of the public schools of New Orleans, or for monies due or taxes levied up to 1879 inclusive, for such purposes and it is not true that this respondent has failed or refused to demand such accounting; that as hereinbefore averred, respondent shows that said accounting was unnecessary, because said city promptly and fully accounted for and paid over to respondent all such appropriations, monies and taxes aforesaid." The Board sets up the prescription or limitation of the action by ten years. R. 17-18.

Therefore it was true as averred by the complainants in their bill, that the School Board refused to demand an account and that complainants were left remediless at law.

The Court referred the matter to Mr. E. D. Saunders as master, who made a report that the city was indebted to the School Board.

The city excepted to the master's report, the exceptions were overruled, and judgment was rendered in accordance therewith in favor of complainant for the amount of school taxes collected and received by the city as trustee.

The city appealed to the Circuit Court of Appeals for the Fifth Circuit and complainant and intervenors took a cross-appeal. The judgment was increased by allowing interest on

the amount received by the city. This Honorable Court granted a writ of certiorari to the City of New Orleans to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, and this is the cause now on trial.

I.

From the foregoing statement it appears that there exists no contest on any question of fact. The master adopted the figures of the city's experts and complainants have acquiesced therein.

As to questions of law; the case is simply one where the City of New Orleans has received for account of the Board of School Directors, during the years 1871 to 1879, the sum of $71,938.78, which she has retained and converted to her own use. R. 27.

Are not complainants entitled to a judgment for this amount with interest from the time of its diversion? To state the proposition is to answer it affirmatively.

II.

We refer your Honors to the acts of the Legislature by virtue of which the City of New Orleans levied and collected the special school taxes which are claimed in this bill. 1871, No. 8, section 7, and 1873, No. 36, section 4.

These acts are printed in full in the addendum.

III.

When this cause had been regulary put at issue, by the filing of the answers and replications the Chancellor ordered the master to "take a full, true, fair and perfect account of all the funds principal and interest received by the City of New Orleans from the school taxes levied in 1871, 1873, 1874, 1875, 1876 1877 and 1878." R. 19.

The master reported that the City had collected up to January 24th, 1881 in principal $23,180.03 and in interest $48,758

75-100 and since January 24th, 1881, up to May 8th, 1897, $799.18, making a total of $71,938 78-100. R. 23 to 29.

The City excepted to the master's report on the sole ground that the interest collected by her did not form part of the school taxes. R. 32.

The exceptions were overruled and the report confirmed. R. 45.

This point is referred to in the seventh assignment of error.

On the question of interest the master said:

"It is a question of law whether the School Board is entitled to any part of the interest. I think it is. The interest, a mere accessory of the principal belongs in my opinion to the same person to whom the principal belongs. Accordingly in my opinion the amount the City of New Orleans now owes to the School Board for taxes collected and for interest on taxes collected, is as above stated, $71,938 78-100." R. 23-24

The Circuit Court of Appeals, Fifth Circuit in passing on this point said: "Under the law the school taxes carried ten per cent interest per annum, from the day they became delinonent. It was a penalty for non-payent of the taxes. This formed no part of the city's proper revenues; the city in collecting the same, was acting as a trustee for the School Board. Delay in payment of taxes operated to the prejudice, not of the city, but of the school fund and its creditors. We are unable to find any authority in law or morals for the city to appropriate to itself this interest. To allow such an appropriation would be to reward the city for its own negligence in the collection of the taxes due the school fund. We fully agree with the master, "that the interest, as a mere accesory of the principal belongs to the same person to whom the principal belongs." R. 158.

The Act of 1871, p. 147, entitled "An Act to amend an Act entitled 'An Act to extend the limits of the Parish of Orleans, etc.,' approved March 16th, 1870, and to prescribe additional regulations for the government of the corporation of the City of

New Orleans," provides, in section 9, transcribed in full in the addendum, "that all taxes imposed by the City of New Orleans, or due to the same and not paid on the 31st day of July of each year, shall be exigible with interest at the rate of ten per cent. per annum from that date," etc., etc.

The collection of the interest was actually made, on the delinquent school taxes, and whether rightfully or wrongfully collected, the amount received should be placed to the credit of the cestui que trust. The city had no interest in said tax and its interest.

There can be no error in this ruling. Legally speaking, this is the only defence properly pleaded in this suit. This point is without merit.

IV.

We will now examine the other defences set up in the answer of the City of New Orleans. R. 11.

First. The city "admits that oratrix recovered judgments against the Board of School Directors, a corporation of the State of Louisiana, and a citizen thereof, both in this Honorable Court, and in the Civil District Court of the Parish of Orleans, as is set forth in oratrix's bill of complaint and records annexed thereto and referred to therein." R. 11.

This admission was sufficient to relieve complainant of the necessity of proving her judgments and their validity.

As long as this admission remained of record the City of New Orleans could not be heard to contradict the judgments.

Second. "Defendant admits that all of said judgments are now final and are payable as decreed and provided for in the said judgments.

This admission strengthens the previous one.

Third. "Defendant denies that the school taxes out of which said judgments have been made payable, is a trust fund levied by the City of New Orleans for the purpose of paying the expenses of the public schools of said city."

The acts of the Legislature of 1871 and 1873 copied in extenso in the addendum, give the direct and explicit contradiction to this averment. The Supreme Court, in the case of Labatt vs. City of New Orleans, said that the city was only a collecting agent. 38 A, 283.

Fourth. "Defendant denies that it has ever failed to collect said taxes punctually, and denies that any of the same remain uncollected, and denies that if any of the same remain uncollected, they so remain by reason of any negligence on the part of this defendant, and denies that defendant is liable at all for the amount of any such taxes yet remaining uncollected, if any such there be."

The answer to this denial is that this decree is merely for taxes which have been collected.

The city's expert found the amount credited on the books of the city and complainants have accepted these figures as correct.

Fifth. "Defendant admits that the City of New Orleans has never paid to the School Board any interest which she may have collected on any back taxes and defendant denies that any such interest, if the same has ever been collected, was due to the School Board and defendant denies that she has ever misapplied or diverted to unlawful uses, any interest that she may have collected from delinquent tax payers, or back taxes, and defendant avers and shows that by express provision of law, all interest which she may collect on any back taxes is especially set aside for certain purposes and cannot by her be used for school purposes or for any other purpose than that commanded by law." R. 12.

The question of the right of the School Board to the interest accrued on delinquent school taxes, has been already discussed under head III of this brief. The creditors of the school fund were the sufferers by the delinquency, and what interest accrued on their claims was supposed to be offset by the interest the taxes carried.

The general averments that the law set aside such interest for certain purposes, have no force in the absence of such law which does not and never did exist.

Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh. The matters contained in these averments have not been called up for trial, and have been reserved for future action. We need not refer to them.

Twelfth. "Defendant denies that it was the duty of the School Board to call this defendant to account and denies that the School Board or the oratrix herein has any cause of action against this defendant for such an account. Defendant denies that there was any privity between the School Board and this defendant or between Mrs. Fisher and this defendant, and further answering, the defendant says that if any such cause of action for an accounting ever did exist in favor of said School Board, or of said oratrix, the same was effective and executory in the year 1880 and became actionable and exigent in the year 1880, and in the years following the year 1873, up to 1879, inclusive. That said action of accounting was personal to said School Board and could only be exercised and availed of by the said School Board, which action is prescribed by the lapse of ten years from and after each of the said years and that oratrix has no right or cause of action in the premises." R. 13.

This defence reduced to its simple expression, is, 1st, that Mrs. Fisher has no right to an accounting for want of privity with the City of New Orleans, and herself, and 2nd, that her action is prescribed by ten years.

1st. The School Board should have brought the action for an accounting, they refused to do it, hence the creditors of the trust fund have the right to avail themselves of the powers of a Court of Equity to reach the funds destined to their payment. The books are full of such cases.

In discussing the rigts of the creditors of the school fund, the Supreme Court of Louisiana, in the case of Labatt vs. City of New Orleans, 38 A., 283, said:

"Hence it is obvious that under the provisions of Act 123 of 1874, as well as under the section of the Act of 1873, just transcribed, the holders of school certificates can look only to the uncollected appropriations of the respective years for which the same have been issued."

In the case of Fisher vs. Board of School Directors, 44 A., 184, the same Court decided that the holders of these school certificates had the right to recover payment out of the school taxes levied prior to 1879.

The judgment which forms the basis of this bill, is "payable out of the school tax levied by the City of New Orleans prior to 1879." R. 52.

A cestui que trust as well as beneficiary of a trust fund can bring a bill for an accounting.

9 Fed. Rep. 793.—20 Fed. Rep. 277—502. 3 Brev. (S. Car.) 47. 30 Ga. 777. 17 Hunn (N. G.) 556. 39 Ala. 726.

Perry on Trust, v. 2, p. 470. 3rd edn. §816, 845, 885.

Spence, v. 1, fo. 364.

Spence, v. 2, p. 32, 33.

5 Peters, 495. Jowles vs. Lawrason.

Story's Eq. Jur. v. 1, sec. 454; v. 2, 648.

Foster's Fed. Practice, 2nd. Edn., p. 662.

2, Brock, 516. 101 U. S. U. S. 601-609.

Grant on Corporations, 138.

2 Dillon, sec. 729. Note.

Tothil, p. 50. Lord Bacon's orders.

1 Schoales & L., 305. 123 Mass. 117.

2 Ves. Jr. 45. 5 Ves. 505.

1 Bli. N. S., 337. Atty. General vs. Corporation of Dublin.

2 Sim. 449. Atty. General vs. Mayor Carlisle.

2 Brown's Practice, 236. Attv. General vs. Coventry.

2 Russ 45. Atty. General vs. Mayor of Exeter.

3 Russ 395. Atty. General vs. Mayor of Exeter.

1 Swanst. 197 et seq.

The Court of Chancery will always lay hold of any breach of trust, in relation of administration of property, let the guilty party of it be either in a public or private capacity. 2 Spence pp. 50-51.

Every cestui que trust is entitled to the aid of a Court of Equity. 3 P. W. 222. Spence v. 2, p. 50. 2 P. W. 595. 2 Keen 134. 68 Ga., 501. 11 Ala., 977. 10 Ga., 273. 131 Ills., 182.

The Constitution of Louisiana of 1879, in the article for the relief of delinquent tax payers, and carried into effect by Act No. 49, of 1880, has made all these school certificates receivable for taxes, and has merged them in one fund. Both are to be found in the addendum.

The record shows that the trustee and cestui que trust, are confederating and combining to defeat complainant, a creditor of the trust fund, and it is to a Court of Equity alone that complainant can apply for relief.

2nd. As regards the plea of prescription of ten years. The School Board and the city have both urged that defence. However the Supreme Court of Louisiana, in the case of Gasquet vs. School Directors, reported in 45 A., 343, said: "We think the pleas of prescription are not well founded. Act 36 of 1873 makes it very clear that the claims evidenced by these certificates were not payable absolutely or at any particular time. They are payable only out of the revenues of the years for which they were issued, and only when said revenues are collected, and in the manner therein provided; and the act further declared that no writ of fi fa, or mandamus shall be issued for seizure of any school monevs or to direct or enforce its payment otherwise than in the manner and sequence required in this act. This law formed part of the contracts out of which the claims arose and deprived the claimants of any legal remedy to enforce payment, except out of particular revenues, when actually collected and covered into the treasury.

"The case is very much stronger and clearer than that of King Bridge Co. vs. Otoe Co., 124 U. S., 459, in which the Supreme Court of the United States held that county warrants, payable only when there are funds in the treasury applicable thereto, are not actionable until the money for its payment is collected and therefore not subject to the statute of limitations, except from the same time."

The judgments sought to be enforced were rendered since 1890, that is, within ten years of their present enforcement, and the school certificates are merged in the judgments.

The cause of action is not prescribed.

The Supreme Court of Louisiana also decided in the case of Mrs. Fisher vs. the Board of Directors of the City Schools, 44 A. 184, copied in R. 93, et seq., that "under Act 49 of 1880, school certificates issued for 1874, 1875 and 1876, were made receivable for any taxes due prior to 1879. This had the effect of creating one fund for school indebtedness prior to said year."

This act also had for effect to recognize the debt of the School Board in so far as it made same payable out of the taxes. But the position of the City of New Orleans was and is that of a trustee, when she receives the trust fund, she is acting for the cestui que trust. She does not hold the funds in her own right.

The Chancery jurisprudence does not recognize any limitation in favor of a trustee. A trustee can never acquire a trust fund.

"The statute of limitations, 21 Jac. 1 c. 16, cannot be pleaded in bar to a trust." 1 Green, N. J. Eq., 280. 3 How. 411. Oliver vs. Piatt. Daniel's Chancery Pleadings and Practice, p. 642.

"As between the trustee and cestui que trust in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. Accounts have been decreed against trustees, extending over periods of thirty, forty and even fifty years. The relations and privity between trustee

and cestui que trust are such that the possession of the one is the possession of the other and there can be no adverse claim or possession during the continuance of the relation." Perry on Trusts, p. 508 to 511.

In support of this equitable doctrine, Mr. Perry has cited nearly three pages of decisions rendered by Chancery Courts.

The same principle was held in Louisiana in relation to corporations declaring dividends. 20 A. 382, St. Romes vs. Levee Steam Cotton Press Co.; 12 R. 536, 30 A. 808.

The citations of authorities to sustain a principle so just, so well recognized and so deeply imbedded in the equitable jurisprudence, leads us to remark that the City of New Orleans, this defaulting trustee, has filled this record, with similar and most inequitable, unjust, illegal and untenable defenses, in the hope that she may escape her just liability.

The double defence contained under this twelfth head should be overruled, first, because a Court of Equity alone can give the relief prayed for; and second, because the action is not barred by the statutes of limitations nor prescribed under the laws of Louisiana.

Thirteenth. "Defendant denies that there is any fund now administered, or which ever was administered by the City of New Orleans, derived either from appropriations, taxes, or money said to be due said School Board, and denies that if there is or was any such fund, that said School Board or oratrix has any rights in the premises." R. 13.

If this allegation be intended as a denial that the City is in possession of the school fund, her answer is untrue. Her own expert has reported against her and the record shows no dispute of facts on this point.

If this allegation be intended to mean that the trust fund being in possession of the City, complainants have no legal right to it, then the proposition of law is as false as the question of fact. We refer to part I of our brief.

Fourteenth. "Defendant admits that the judgment of oratrix are payable as stipulated in said judgments, but denies that oratrix has any equitable lien enforceable against the City of New Orleans, before a Court of Equity by reason thereof."

This is another admission of the validity of the judgments and admissions first and second, coupled with the present one, are conclusive of the validity and finality of said judgments.

The judgment being made payable out of a trust fund authorizes the Court which rendered it to bring the fund in Court and to compel the trustee to account.

Fifteenth. "Defendant denies under the law were the services which she alleges, have been merged in her judgments, ever received by the City of New Orleans directly in payment of the school taxes without the intervention of the Board of School Directors." R. 13.

We are at a loss to understand this ground of defense. Nowhere else in the record is it insisted upon or explained.

Sixteenth, Seventeenth, Eighteenth. The matters alleged under these three heads are not before the Court.

Nineteenth. (a) "Defendant denies that any acts which have been done by her are contrary to equity and defendant denies that the oratrix has any right or reason to invoke the equitable jurisdiction of this Honorable Court.

(b) "Further answering, defendant shows that there does not appear in the bills of complaint of oratrix herein any allegation of any indebtedness by the City of New Orleans to the said School Board and that without having made said allegation oratrix is without right to proceed against this defendant herein.

(c) "Further answering, defendant shows and avers, that it has been decreed in the judgments of oratrix herein sued on, and in other suits of a similar nature, by other parties against the City of New Orleans, that oratrix and such other complainants have no cause of action against the City of New Orleans on account of the claims of the character sued in the judgments hereinbefore referred to." R. 14.

(a) This ground reiterates the defense under No. twelve. An equity court is the only court capable of granting the relief sought.

(b) It is averred in the bill that the City had failed to pay a portion of their collection, the interest, to the School Board, and that the letter refused to demand an account. It was unnecessary to allege more.

(c) What is meant here is that Miss Caroline Labatt had sued the City of New Orleans on the school certificates given to her by the School Board and that the Supreme Court of Louisiana decided in 38 A. 283 that there was no privity of contract between Miss Labatt and the City of New Orleans. Here we are not sueing on any certificate. We have obtained a judgment against the School Board, and we are here excercising the rights which it was the duty of this Board to enforce and which they refuse to do. The cases are very different.

After the filing of the answer, a replication was duly filed and the case put at issue. The matter was referred to a master and the only exception filed to his report was one raising the question of liability of the City for the interest collected by her on delinquent school taxes. We have been thus particular in bringing to the attention of this Court the various defenses set up, for the reason that the assignment of errors are for the most part new issues sought to be raised.

V.

The Question of Jurisdiction.

When the master had made his report, based on the figures of the expert appointed by the City, who had virtually reached the same result as complainants' expert, although these gentlemen had made their examination independently, extending through many books and covering thousands of items, it be-

came evident that the City would be compelled to refund. Then commenced an effort to complicate matters.

The report of the master was made on the 22nd of May, 1897, R. 23. On the 27th of May, five days thereafter, a motion was made by the City's solicitor to make the Board of Liquidation a party to this suit. R. 29.

The Board of Liquidation demurred. R. 33.

The demurrer was sustained. R. 40.

On the 29th of June, 1897, the City filed the following exception: R. 35.

" Now into Court comes the City of New Orleans and excepts to the jurisdiction of the Court ratione materiae et personae.

"Defendant shows that Mrs. M. M. Fisher is a citizen of New Orleans, and of the State of Louisiana.

"That plaintiff's petition contains no averment that the suit could have been maintained by the assignors of the claim sued upon by Mrs. M. M. Fisher in the suit which forms the basis of this action.

"Wherefore, exceptor prays that this exception be maintained and that plaintiff's suit be dismissed at her cots," &c. R. 35.

This paper was filed without leave of Court; it was not in the form of a plea in chancery; and it only attacked the jurisdiction of the court, as to the bill. Even if all the averments of this exception were true, they would not defeat the jurisdiction of the court because this suit was ancillary to the original case, where the judgment was final and conclusive and so admitted by the answer.

On July 1st, 1897, the jurisdictioon of the court was again sought to be raised by a plea made in the form required by the chancery pleadings, "on the ground that complainant Mrs. M. M. Fisher is a citizen of the State of Louisiana, and is residing in the City of New Orleans at No. 2335 Chippewa street; that plaintiff Mrs. M. M. Fisher and defendant are both citizens of the State of Louisiana." R. 36.

This plea does not aver that any fraud had been perpetrated on the jurisdiction of the court, nor does it aver when defendant became aware of the fact alleged nor does it aver that due diligence had been used. The plea was in direct conflict with the previous admission as to the validity and finality of the original judgment.

Under equity rule number 60, "after replication, or setting down for a hearing it, (the answer) shall not be amended in any material matters, as by adding new facts or defenses or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party supported, if required by affidavit."

The equity rule was disregarded.

Besides the plea did not in any manner attack the jurisdiction of the court on the ground that the court could not have rendered a valid judgment in the original suit, but attacks the jurisdiction to maintain this equity proceeding.

On the 11th of December, 1897, a motion was made by the City attorneys to annul the original judgment on the ground that the assignors of the school certificates were citizens of Louisiana and the defendant also, and therefore the Court was without jurisdiction. R. 106.

This issue was made in the original suit. R. 49.

The matter was submitted to a jury. R. 51.

The verdict was in favor of the jurisdiction and the judge overruled the exception. R. 51.

A final judgment was afterwards rendered in favor of Mrs. Fisher and her husband. R. 52.

(a) Final judgments cannot be annulled on a simple motion. A writ of error or a bill of review are the proceedings.

(b) The City of New Orleans was not a party to the original judgment. The Board of School Directors for the City schools were the only defendants, and the only ones condemned to pay.

The VIIth Amendment of the Constitution provides:
suits at Common law, where the value in controversy
ll exceed twenty dollars, the right of trial by jury
ll be preserved, and no fact tried by a jury shall
erwise be re-examined, in any Court of the U.S. than
ording to the rules of the Common law."

Therefore the City of New Orleans showed no interest to obtain a writ of error, nor to file a bill of review.

(c) As long as the original judgment remained in force, the court of chancery was vested with ancillary jurisdiction to enforce the decree.

(d) But even if the City had a right to file a bill of review: it is a condition precedent, in the equity courts that the defendant must first execute the decree before being heard on a bill of review.

(e) But your Honors must have perceived that the judgment was in favor of Mr. Fisher as well as Mrs. Fisher, and in none of the pleas, motions or exceptions is any mention made to contradict the fact that Mr. Fisher was an alien. In fact, under the laws of Louisiana, the choses in action sued upon were presumed to be community property, and the husband as the head and master of the community, had full charge of its management. C. C. 2402-2404. On the other hand, if the property was the paraphernal property of the wife, the same is under the charge of the husband.

C. C. 2385: "The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband."

The judgment is that Mrs. M. M. Fisher and her husband M. M. Fisher have judgment, &c. R. 52.

On the 20th of December, 1897, a motion was again made to put at issue the jurisdiction of the court, unaccompanied by any affidavit according to equity rule No. 60, but the Judge refused to permit said motion to be filed. This was strictly in accordance with the rule. R. 107.

This last motion contains a suggestion but no proof that it was since filing the exceptions to the master's report that defendants discovered that plaintiff is not a citizen of Louisiana.

The exceptions were filed June 7th, 1897. R. 32. The motion was made Dec. 20th, 1897.

We call your Honors' attention to the following authorities settling the validity of the original judgment and jurisdiction of the equity court to maintain this bill:

"To this bill the defendant Root demurred for the reason that the court had no jurisdiction, because both complainant and defendant were citizens of the same state." p. 405.

"The bill being ancillary to the original proceeding of Morton against Root and supplementary to the decree rendered therein, can be maintained without reference to the citizenship or residence of the parties. There is consequently no objection that the court below had no jurisdiction in this case because the appellee and the appellant were both citizens of Nebraska. Krippendorf vs. Hyde, 110 U. S. 276; Pacific R. R. vs. Missouri Pacific Railway, 111 U. S. 505;,, 150 U. S. 413. Root vs. Woolworth.

"As to the allegation in the bill that the court was without jurisdiction of the suit brought by Widow Cave, because she alleged falsely therein that she was a citizen of France, when in fact she was a citizen of Louisiana, and thus the court had no jurisdiction of the suit as between her and Marceline Carvailhez, that question cannot be raised and adjudicated in this suit. By the record of the former suit, there appeared to be jurisdiction, and the plaintiff cannot question it by means of this suit, when the question it not raised by Marceline Carvailhez, who was the defendant in the former suit.

"Although the present suit is between two aliens, yet, inasmuch as it is brought in the same circuit court in which the former decree was rendered, and to impeach that decree, we think that the court had jurisdiction." 144 U. S. 126. Lacassagne vs. Chapuis.

"But we do not wish to be understood as holding that, even if jurisdiction had not been apparent upon the record, advantage could be taken of it, after a final decree, and in a collateral proceeding. Thus in Skillern's Executors vs. May's Executors,

6 Cranch 267, a case which had been reversed by this Court and sent back to the Circuit Court, was discovered to be one, not within the jurisdiction of that Court. But as it appeared that the merits had been finally decided in this Court and its mandate required only the execution of the decree, it was held that the Circuit Court was bound to carry the decree into execution, although the jurisdiction of that Court was not alleged in the pleadings. So in McCormick vs. Sullivant, 10 Wheat. 192. A prior judgment between privies in estate was pleaded in bar of the remedy sought to be enforced in the suit, then under consideration, and objection was made that the proceedings did not show that the parties to it were citizens of different states, and consequently, that the Court was without jurisdiction and the decree void. It was held, however, that the Courts of the United States, though of limited, were not of inferior jurisdiction, and that, if jurisdiction were not alleged in the pleadings, their judgments and decrees were erroneous and might be reversed for that cause; but that they were not absolute nullities, and that the decree in the former case, while it remained unreversed, was a valid bar to the suit under consideration. To the same effect are Ex parte Watkins, 3 Peters 193; Kennedy vs. Georgia State Bank, 8 How. 586; Des Moines Navigation Co. vs. Iowa Homestead Co., 123 U. S. 552, and the recent case of Dowell vs. Applegate, 152 U. S. 327.

"These authorities are especially pertinent to this case, in view of the fact that, after removal of the case to the Federal Court, the parties thereto, including the plaintiffs herein, acquiesced in its jurisdiction." * * * 156 U. S. 533. Evers vs. Watson.

If the Federal Court erred in assuming jurisdiction, its final decree, being unmodified and unreversed cannot be treated as a nullity and cannot be assailed collaterally. 152 U. S. 339, Dowell vs. Applegate; 111 U. S. 252, Bors vs. Preston.

"As said in Des Moines Nav. Co. vs. Iowa Homestead Co.,

above cited, if the Circuit Court kept a case when it ought to have been remanded, or if it proceeded to adjudicate upon matters in dispute between two citizens of Iowa, when it ought to have confined itself to those between citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity." 152 U. S. 340, Dowell vs. Applegate.

"The judgment is conclusive in respect to the parties to it. It cannot be impeached collaterally, and it cannot be questioned upon a creditor's bill. 8 Wall. 373, Mattingly vs. Nye. 160 U. S. 539, Laing vs. Rigney.

The case of Benjamin vs. City of New Orleans, 169 U. S. p. 161, differs from the Fisher case in the fact that complainant based his bill on warrants issued by the Metropolitan Board, not on any judgment against that Board.

The original judgment was therefore rendered by a Court with jurisdiction, because:

1st. The real plaintiff in the suit was Jno. Fisher, whose alien citizenship has never been questioned. The cause of action was either community property or the separate paraphernal property of the wife. In the prior event, the husband, as the head and master of the community, had control thereof; in the latter case, the matter "is considered to be under the management of the husband." C. C. 2385.

The judgment was in his favor. R. 52.

2nd. The city admitted the validity and finality of the judgment, and was afterwards estopped from contesting the same.

3rd. The judgment was not against the City of New Orleans, and the School Board alone could attack it. They have not done so.

4th. The judgment was final and could only be reversed by a writ of error.

5th. The judgment could not be attacked collaterally.

The Court is vested with jurisdiction to entertain this bill.

because the jurisdiction is ancillary to enforce the prior judgment.

VI.

An appeal was taken by the City of New Orleans to the Circuit Court of Appeals. Fourteen assignments of error having been filed, were all passed upon by the Appellate Court. R. 155.

The assignments are substantially as follows:

First. (a) It was error to have allowed to complainant the school taxes of 1871, because her claims did not arise during that year.

(b) The school taxes of 1871 were not claimed in the bill.

1st. These two grounds were not part of the exception to the master's report. The objection comes too late.

2nd. Under article of the Constitution of Louisiana of 1879 for the relief of delinquent tax payers and under act No. 49 of 1880, printed in the addendum, all the school taxes prior to 1879 were consolidated into one fund.

3rd. The Supreme Court of Louisiana decided that the school taxes under the constitution and law above quoted, constituted but one fund. Fisher vs. School Board, 44 A. 184; Gasquet vs. School Board, 45 A. 342; Fisher vs. School Board, 48 A. 1077.

4th. The judgment which was rendered in favor of complainant against the School Board, (R. 52) is made "payable out of the school taxes levied by the City of New Orleans prior to 1879."

5th. The City of New Orleans has no interest to raise this issue. The Supreme Court of Louisiana has decided that the School Board "administer school affairs without any possible control on the part of the city authorities." R. 95. If the city pays she will be discharged. The right of complainant to be paid out of the school taxes of 1871 is res adjudicata.

6th. The allegations of the bill are that "her judgments are made payab.e out of school taxes prior to 1879, and the prayer of the bill is for a full account and for general relief. R. 2, 3. The order of reference specifies the school taxes of 1871. R. 19, 20.

Second. No judgment should have been rendered for the sum of $11933 27-100, discount allowed on taxes.

1st. This question was not raised in the exceptions to the master's report.

2nd. The act of 1874, No. 41, printed in the addendum, which authorizes the city officers to allow a discount on taxes paid in advance contains the following: "Provided no discount be made upon school tax."

Third. That the full amount of money collected for 1874 was turned over to the School Board (see testimony of Clark Steen and his report offered in evidence by complainant); it was error to make the city pay over any more money out of the taxes of 1874, the city having already paid over all that she owes on that year. Such being the case, the amount of $10,816.59 and $209.50, proportion of interest on school taxes for 1873 and the proper proportion of principal for school taxes for 1874 (to ascertain the amount of which a reference to the master's report is necessary), are not due to the School Board. While it is true that all back taxes prior to 1879 are lumped into one fund, we urge that in calling for an accounting, it is sufficient for the city to show, in order to be discharged are far as the taxes of any particular year are concerned, that she has paid over the full amount of taxes due the School Board for that year, and having done this, with the taxes of 1874, it is error for the Court to order her to turn over any more of the taxes for that year.

1st. This matter was not involved in the exceptions to the master's report.

2nd. The city is not in good faith in making this objection. In point of fact, the exception is not true.

The record discloses a detailed statement of the conditions of the school fund from 1873 to 1878, inclusive. R. 53 to 63.

The total result of each of these years is tabulated at p. 54.

The total taxes collected during these years amounted to	$1,554,131.81
The total amount paid out and received in certificates during the same time	$1,547,024.65
Leaving a surplus of	$7,107.16

due by the city to the School Board. R. 71.

This amount is fully explained by Mr. Clark Steen, an expert, thoroughly acquainted with the city treasurer's book and who had made a previous examination under appointment by the Civil District Court of New Orleans.

In this report the school tax of 1873 balances, but the report shows, and Steen testifies, that the treasurer stopped paying on the 2nd of March, 1876. This is also true of 1871. The city's expert, Mr. Aitkins, commenced the taking of the school taxes for 1871 and 1873 only from the 2nd of March, 1876. R. 54-25-27.

For the year 1874 the total tax collected was $302,741.91, and the total paid and certificates received amounted to $315,423.46; accordingly, the city overpaid that year $12,681.55. But in the year 1878 the city received $200,182.82 and paid out only $185,926.15; she had therefore received $14,256.67 more than she paid out, balancing these overpaid and underpaid years, leaves as aforesaid, the city in the debt of the School Board in the sum of $7,107.16. R. 71-54.

Mr. Aitkens, the city's expert, cut this amount to $6,949.44. R. 25.

The difference was trifling, and rather than enter into a dispute of facts, we accepted his figures.

This amount	$6,949.44
The school taxes of 1871, collected from March 2nd, 1876	7,821.17
The school taxes of 1873, collected from March 2nd, 1876	8,409.42
The interest collected and retained by the city	47,959.57
All collecter prior to January 24th, 1881	
And the amount collected since 1881 to May 8, 1897	799.18
Foot up the amount of the decree	$71,938.78

It is not true, therefore, that we charged the city for collections of 1874 more than received.

In passing on this assignment of errors the Court of Appeals said: This assignment raises more matter involved in the master's report, of which no complaint was made in the exceptions filed to the report, and the assignment need only be noticed, because it contained an admission that all the back taxes prior to 1879 were lumped into one fund." R. 156.

Fourth. That complainants have a remedy at law.

We have fully argued the question of the remedy under No. IV, twelfth, No. 1.

We have here to deal with a trust fund, where the cestui que trust, our debtor, refuses to avail himself of the right to demand an account, and our only recourse was to the Equity Court.

"We consider the bill as a creditor's bill to reach equities existing between the School Board and the City of New Orleans, in which an accounting between the two parties is necessary in order to ascertain the indebtedness of the city to the School Board. No such relief can be obtained at law." R. 157.

The Court which rendered the judgment for complainant, "payable out of the school tax levied by the City of New Orleans prior to 1879 had the right to exercise its equitable jurisdiction to bring the fund in Court and make its judgment effective.

Fifth. "Complainant had no right to sue the City of New Orleans, because her judgments are against the School Board only, and she does not allege that the city owes the School Board anything."

The bill sets out various causes of action and averred that the School Board "have refused to demand an account of the school taxes." R. 2.

The Court of Appeals said: "We think the issue of indebtedness of the City of New Orleans to the School Board is sufficiently asserted in the bill and is clearly put at issue in the answer." R. 157.

It is too late to object to the sufficiency of the allegations of the bill, when the indebtedness of the city to the School Board had been proven by her own expert, without any objection.

Sixth. The substance of this assignment is that complainant is estopped because the city was garnisheed under a fi. fa, in suit 12,060, and complainant did not traverse her answer.

The Circuit Court of Appeals answered this objection as follows:

"The proposition enunciated in this assignment of error is that an issuance of execution and garnishment proceedings thereunder operate an estoppel to a creditor's bill founded on the same judgment and seeking an accounting between the judgment debtor and the garnishee. If the general proposition should be conceded its applicability in the present case is not apparent. In our view, the garnishment proceedings shown in this record were against the treasurer of the city and ex-officio treasurer of the School Board—a stakeholder—under which law no accounting as between the City of New Orleans and the

School Board could have been had." Nothing further need be said.

Seventh. "The Court erred in allowing the interest collected. This question has been fully discussed under head III and need not be mentioned again.

Eighth, Ninth. These assignments refer to the refusal of the Chancellor to allow the pleas to the jurisdiction of the Court to be filed.

We have fully discussed the ruling of the Court and shown that defendant did not comply with Equity Rule No. 60.

Besides the Court had ancillary jurisdiction without reference to the citizenship of the parties. See No. V.

The original judgment was final and could not be attacked collaterally, and could not be attacked at all by the City of New Orleans, she not being a party to the suit.

Tenth. The plea of prescription has been fully discussed under No. IV, twelfth, No. 2.

The cause of action against the School Board was not prescribed. 45 A. 342; Gasquet vs. School Directors, and the action of the cestui que trust in the case of an express trust, as the case happens to be, is never prescribed.

Eleventh. This assignment again refers to the jurisdiction.

Twelfth. The city was not a trustee. "The city was collecting the school taxes, for the School Board, and therein acting as agent, and a trust naturally resulted." R. 160.

This was an express trust created by statute.

Thirteenth. This assignment denies the right of the complainant to claim an accounting from the city.

"This objection goes to the right of the complainants to maintain this suit for an accounting which seems to us so plain that no argument is needed to sustain it." R. 160.

Fourteenth. "It was error to order the whole fund paid over to complainant and intervenors.

This suit was brought for the benefit of complainant and

others similarly situated. The City of New Orleans is not interested in the distribution of the fund by the Court. She is interested in obtaining a discharge.

We fear, that the City of New Orleans, this defaulting trustee, is urging this point for no other purpose than worrying the Court and litigant. She has not paid, nor does she contemplate paying one cent.

She tortiously converted the trust fund and she does not intend to refund one cent.

Her solicitude for the equal distribution of the school fund is pure hypocrisy.

She received 69991.99 of school certificates in payment of school taxes, without regard to an equality of distribution and she is very late in asserting her solicitude, to-day.

VII.

On the Question of Interest.

By what law is the Circuit Court of the United States, sitting in Equity in the State of Louisiana, guided?

The Constitution of the United States provides: (Art 111, Sec. 2) "The judicial power shall extend to all cases, in law and "Equity, arising under the Constitution."

In Livingston vs. Story, 9 Peters 654, the Supreme Court of the United States said: "When the Constitution was adopted "and the Courts of the Union organized, and their jurisdiction "distributed, Louisiana formed no part of this Union. It is "not reasonable, therefore, to conclude that any phraseology has "been adopted with a view to the peculiar local system of laws "in that State. She was admitted into the Union in the year "1812; and by Act of Congress, passed for that purpose, 4 Laws "U. S. 402, it is declared that there shall be established a Dis-"trict Court to consist of one Judge, to be called the District "Judge, who shall, in all things, have and exercise the same

"jurisdiction and powers, which, by the Act the title whereof "is in this section, recited, were given to the District Judge of "the Territory of Orleans," * * * "which is, in suits of "Equity, and those of Admiralty and Maritime jurisdiction, "according to the principles, rules and usages which belong to "the Courts of Equity and Courts of Admiralty, respectively, "as contradistinguished from Courts of common law, subject to "such alteration by the Courts as may be thought expedient."

Robinson vs. Campbell, 3 Wheaten 222.

United States vs. Howland, 4 Wheaten 114, and

Parsons vs. Bedford, 3 Peters 444, settled that the absence of Courts of Equity in that State (Louisiana) does not prevent the exercise of equity jurisdiction in the Courts of the United States, according to the doctrine of this Court. In the case of the United States vs. Howland, which arose in Massachusetts, where there are no Equity State Courts, the same doctrine was held. (p. 457.)

In that case, at p. 115, the Court there said: "And as the "Courts of the Union have a Chancery jurisdiction in every "State, and the judiciary act confers the same chancery powers "on all, and gives the same rules of decision, its jurisdiction in "Massachusetts must be the same as in other States."

If, therefore, this Court must decide this controversy according to the rules of decision in the Chancery Courts, we submit that complainant and intervenors are entitled to the interest allowed in the decree, on the strength of the authorities hereinafter submitted:

The Sovereign may be trustee. Vol. 2, Spence, p. 32. 2 Fonblanque 139. 40, note. Lewin, p. 73.

Corporations can be trustees. 2 Spence, p. 32 (bottom). "Where there is any fund created for the purpose of being put to some public use, which fund is vested in a corporation, the Court of Chancery has, by its original inherent jurisdiction, a right to see to the due application of the fund.

"A corporation, public or private, being a trustee, is in this Court, the same as an individual." 2 Spence, Vol. 2, p. 33, citing; Attorney General vs. Governors of Founding Hospital, 2 Vesey, Jr., 45. Mayor of Coventry vs. Attorney General, 7 Bro. P. C. 235.

"It is an imperative duty of an accounting party, whether an "agent, trustee, a receiver or an executor, for this respect, as "was remarked by the Lord Chancellor in Lord Hardwicke vs. "Vernon (14 Vesey 510-11) they all stand in the same situation "to keep his accounts in a regular manner, and to be always "ready with his accounts. Neglect of this duty is a ground for "charging him with interest on the balances in his hands and with "costs. So a trustee and executor is bound to render every nec-"essary information that is required of him; and he, who, under-"taking to give information, gives but half information, in the "view of the Court of Chancery, conceals; if he have not given "all the information necessary, he is bound to seek for it, and, "if practicable, to obtain it.

"The Court does not visit the improper holding of money, "if there is nothing more, further than by charging the execu-"tor with interest; but if his account is falsified, if anything like "fraud appears, then the Court gives costs.

The answer of the City admits that she has kept all the interest collected on the school taxes and that she has used the same for other purposes. (5th clause of the answer.)

The evidence shows that the City retained the principal of the taxes 1871 and 1873, after the 2nd day of March, 1876.

The evidence shows further that when the garnishee answered, there should have been on the books $7107.16 more than the $1,893.00 acknowledged.

Of course, the City stands before this Court in a very unenviable light. She kept part of the trust fund for her own use, she falsified the account, and now that the facts are clearly proven she still resists by technicalities their just payment. Un-

der the strict rules of Chancery more than simple interest is allowable.

We now quote from Daniel's Chancery Pleadings and Practice, p. 1369:

"It seems, formerly, to have been thought that no direction "could be given at the hearing upon further consideration, for "the computation of interest, where the question of interest had "not been reserved by the original decree; and not only may "the computation of simple interest be so directed, but, where "the Court finds large sums of money in the hands of an agent, "receiver or trustee, or personal representative, it may direct "balances from time to time in the hands of the accounting "party to be ascertained, and interest to be computed on them."

Daniel's 5th Edition by Perkins.

The following authorities are quoted in the text in its support:

"Pearse vs. Green, 1 J. & W. 135, 141, 144.

"Johnson vs. Pendergast, 28 Beav. 480.

"Davenport vs. Stafford, 14 Beav. 319.

"2 De G., M. & G. 901.

"As the practice of allowing rests and compound interest "against trustees see:

"Fay vs. Howe, 1 Prck. 527, (2nd Edition) 528, and cases "cited in note (1).

"Brynton vs. Dyer, 18 Prck. 1.

"Hughes vs. Smith, 2 Dana 253.

"Karr vs. Karr, 6 Dana 3.

"Hodge vs. Hawkins, 2 Dev. & Bat. 566.

"Ringgold vs. Ringgold 1 Haw. & Ga. 11.

"Harland's Accounts, 5 Rawle 323.

"Trustees, Executors, Guardians, &c., will, in cases of gross "delinquency, be charged with compound interest. See the "cases cited above, and 2 Kent 231, note, in which this subject "is considered and the cases cited.

"Diffenderffer vs. Winder, 3 Harr. & G. 311.

"2 Story Eq. Jur. 1277.

"Charlson vs. Depeyster, 1 Hopk. 424.

"Rogers vs. Rogers, 1 Hopk. 515.

"Douford vs. Douford, 12 Sumner's Ves. 1275, note (a).

"Evartson vs. Tappan, 5 Johnson's Chancery 497.

"Where a trustee has employed the trust money in trade and "refuses to account, he will be charged with compound interest. "See:

"Schieffelui vs. Stewart, 1 Johns. Ch. 620.

"McKnight vs. Walsh, 2 C. E. Green 137.

"Newton vs. Bennett, 1 Bro. C. C. (Perkin's End) 361, 362.

"Frey vs. Frey, 2 C. E. Green 71.

"Barney vs. Saunders, 16 How. 542.

"The Court has even gone the length of charging an account- "ing party with interest on the balance in his hands, on further "consideration, not only where there was no reservation of the "question of interest, by the original decree, but even where the "original bill did not pray that, he might be so charged, and "where the circumstances were such that a claim for interest "existed and was known to exist, at the time of the filing of the "bill."

"Turner vs. Turner, 1 J. & W. 39, 43.

"Pearse vs. Green, 1 J. & W. 135.

"Good vs. Blewitt, 1 J. & W. 142.

"Wilson vs. Metcalf, 1 Russ. 530, 533, 537.

"Hollingsworth vs. Shakehaft, 14 Bear. 492.

"Stafford vs. Fiddon, 23 Bear. 386.

"Johnson vs. Pendergast, 28 Bear. 480.

"Fry vs. Fry, 10 Jur. N. S. 983.

In Fonblanque's Equity, B. 5, Ch. 1, Sec. 3, a very elaborate dissertation on interest, it is said: "As to the time when the "interest shall commence, it seems regularly to begin from the "delay of payment," * * * "but those who retain money

"in their hands and convert it to their own use, without the con-"sent of the owners, are bound to pay interest, although it be "not demanded, as a punishment for their knavish dealing."

Domat's Civil Law, Vol. 1, B. 3, Tit. 5 Sec. 8.

"Courts of Equity proceed upon this principle in ch rging "executors and trustees with interest on trust property."

Chancellor Kent states the rule, Vol. 2, p. 231, to be that the trustee who converts the trust money to his own use, will be condemned to pay conpound interest with rest every six months.

2nd.

Let us turn to Louisiana law and see if it is different from the doctrine laid down in the Chancery Books, which govern the exercise of the jurisdiction of this Court.

C. C. 1938 and R. S., Sec. 1883, "All debts shall bear interest "at the rate of five per cent per annum from the time they be-"came due, unless otherwise stipulated."

C. C. 2924: "Interest is either legal or conventional. Legal "interest is fixed at the following rates, to-wit: At five per "cent per annum on all sums which are the object of a judicial "demand, whence it is called judicial interest."

C. P. 554: "Interest at the rate of five per cent shall be "allowed on all debts from the time they become due, unless "otherwise stipulated."

Tested by these rules the money received by the City of New Orleans, prior to 1881, January 24th, had already been due a considerable time. Mr. Aikens, the city's expert, whose report is made part of the Master's report, stopped his investigation on the 24th of January, 1881. At that date the amount which the City had received from the school taxes amounted to $71,-139.60; this sum was the accumulation of all the collections from 1871, not accounted for, up to 1881.

The City had no right to use these funds, and it is admitted that she used the same as soon as collected.

Under our Civil Code we might consider the City of New Orleans as the agent of the School Board to collect and pay over the said school taxes. In fact, the Supreme Court of Louisiana, in Labatt vs. New Orleans, 38 A. 287, said: "Hence it is ob-"vious that under the provisions of Act 123 of 1874, as well as "under the effect of Sec. 10 of Act 36 of 1873, the holders of "school certificates can look only to the uncollected appropriation "of the respective years for which the same have been issued. "This shows the fullest extent of plaintiff's claim against the "City of New Orleans, which is simply a collecting agent, owing "no other account to the State or to any other authority, beyond "an effort to collect, and a payment of the amount collected."

If this be the status which the City occupies, i. e., a collecting agent, then we turn again to our Civil Code and read a special article under the title of mandate:

"C. C. 3015: The attorney is answerable for the interest of "any sum of money he has employed to his own use, from the "time he has so employed it, and that for any sum remaining in "his hands from the day he becomes a defaulter by delaying to "pay it over."

Tested by the above rule, there is no doubt that interest was due from the 24th of January, 1881, when the City had already used the funds for her own use.

Are the rules of law binding on the City of New Orleans?

The authorities quoted in the first part of the brief consider a corporation the same as an individual.

The city charter provides that New Orleans can sue and be sued (1896, p. 47) putting her on a level with other natural persons and subjecting her to the same rules of decisions.

As to matters of contract, the Circuit Court for the Eastern District of La. has rendered judgments against the City of New Orleans in many cases, some of which are as follows:

C. H. Stewart vs. the City of New Orleans, 11,626 Circuit Court for the Eastern District of Louisiana. In this case the

suit was based on certificates payable to bearer, which carried on their face a waiver of interest. Nevertheless, when plaintiff alleged and proved at law that the funds out of which he was to be paid had been diverted, the Court rendered a decree with full interest.

W. O. Johnson vs. City of New Orleans, No. 12,669 Circuit Court for the Eastern District of Louisiana. In this case interest is allowed since 1887.

In Creole Steam Fire Engine Co. vs. City of New Orleans, 39 A. 981, suit was brought on certificates payable to bearer, carrying a waiver of interest, yet interest was allowed, from judicial demand. In that case the Court said: "The record "does not disclose the reasons of the Judge a quo for his judg- "ment, and the only one assigned by plaintiff's counsel is the "provision of law that debts bear interest from the time when "they are due. Even if debts payable only out of particular "revenues, when collected, fell under this provision, in absence "of proof that the revenues applicable are in the treasury and "demand for payment out of same has been made, the provision "can, in no event, apply to this case, where the evidences of "obligation declared upon expressly exclude interest." Yet the Court allowed interest from judicial demand.

In Fernandez vs. the City of New Orleans, 42 A. 3, the Supreme Court says: "Had there been funds and had the City re- "fused, there would have been a delinquency, and as a penalty "for failing to perform her obligation, the City would have been "liable for judicial interest to the plaintiff, for damages."

In Barber Asphalt Co. vs. City of New Orleans, 43 A. 474, the money was not in the treasury, yet the Court allowed interest from judicial demand.

In all the above cases, however, the City was sued as a delinquent obligee, and the decisions are not as strong against the City as the present case, which is one of trust, one of agency.

The Civil Code expressly says that the agent owes interest when he employs any sum to his own use.

Therefore, if the City be an agent, as the Supreme Court said in the Labatt case, the judgment is correct in allowing interest. 38 A. 283.

If the case be tested by the rules of Equity Jurisprudence, the City has been guilty of a "knavish conduct" when she took the money and concealed the fact, and she owes the interest.

If this case be tested by the Louisiana law, purely and simply, she owes the interest.

Under the Criminal Laws such conduct on the part of a natural person would be considered embezzlement.

Complainant has a right to claim compound interest, and he leaves this Honorable Court to pass on the quantum to be allowed.

Your Honor's attention is called, for a moment, to the fact that when it was apparent to the City of New Orleans that the funds which she acknowledged, as accruing to the school taxes were entirely inadequate to pay the school warrants or certificates in full, yet she received certificates to the extent of $69,991.99 for their full face value, in payment of school taxes.

The maxim of Equity "Equality is Equity" was being violated by the City to the detriment of the other certificate holders.

If this sum of Sixty-Nine Thousand Nine Hundred and Ninety-one dollars were added to the present fund, it would materially increase the dividend of people who have been despoiled and who had to resort to all the resources of the law to obtain partial justice.

The lower Judge had simply followed both Equity Law and the Louisiana Code, when he allowed interest in the judgment, on the amount collected and received.

VII.

A complaint is made in this Court that Mrs. Fisher and her husband had acquiesced in the judgment which allowed no in-

terest on the money received by the City for the schools, and therefore had no right to take a cross appeal.

The answer to this complaint is:

1st. That the cross appeal was tried without objection by the City, and it is too late to urge this objection;

2nd. That the objection not having been urged in the Circuit Court of Appeals, cannot be heard here.

3rd. That there is no evidence before this Court and none can be offered to prove the acquiescence. This Court does not receive evidence in the first instance.

4th. The jurisprudence as settled by this Hon. Court is that: "In no instance with our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by the force of the judgment or decree. If the judgment is reversed, it is the duty of the Court to restore the parties to their rights." 7 How. 184, Erwin vs. Lowry.

"Partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, is not and never was a bar to a writ of error, where it appeared that the levy was made, or the payment was received prior to the service of the writ, and there is no well-considered case which affords the slightest support to any such proposition." 3 Wall. 702, United States vs. Dashiel.

The same doctrine was held in 107 U. S. 8, Embry vs. Palmer, quoting the above case.

So also, 93 U. S. 154, O'Hara vs. McConnell, re affirming 7 How. 184, Erwin vs. Lowry.

VIII.

Let us now resume the various points made:

I. A final judgment is rendered in favor of complainant against the School Board, by a Circuit Court of the United States, payable out of the school taxes levied by the City of New Orleans, prior to 1879. R. 52.

An account is demanded by the judgment creditor from the City and the School Board is made a party, it being averred that the latter refused to demand the account.

The matter is referred to a master, who accepts the figures given by the City's expert. No question of facts is at issue and judgment is sought only for the cash collected, with 5% interest per annum from the day when the expert closed the accounts.

II. The acts of the Legislature of Louisiana levying the special school tax are referred and printed in the addendum.

III. The exception filed to the Master's report by the City show that the City claimed as hers the interest accrued on the school taxes. Her contention was denied by the Court.

IV. The numerous defenses, none of which need to be specially referred to, show no merit, either in conscience or in law.

V. The question of jurisdiction of the Court may be summed up, in the fact that it is ancillary to the original case, without regard to the question of citizenship of the parties.

VI. The assignment of errors of the City present no new point. It is only notable that the School Board, who, according to the Supreme Court of Louisiana, administer school affairs without any possible control on the part of the city authorities, (R. 95), make no complaint.

VII. The record shows the City of New Orleans to have been an unfaithful trustee, and whether she is judged under the principles of Equity Jurisprudence or under the Civil Law of Louisiana, she owes interest on the amounts received by her for account of the schools, from the time she used the money.

VIII. Under the jurisprudence of this Hon. Court there is no estoppel to an appeal by reason of an attempt on the part of complainant to collect a part of the decree in her favor.

Complainant and intervenors pray that the judgment of the Circuit Court of Appeals for the Fifth Circuit be affirmed with costs.

Respectfully submitted,

CHS. LOUQUE, Solicitor.

April 16, 1900.

ADDENDUM.

(No 8 of 1871.) An Act.

Entitled an Act to Amend an Act entitled An Act to Regulate Public Education in the State of Louisiana and City of New Orleans, and to raise a revenue for that purpose, approved March 16, 1870.

Section 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, That the State Board of Education shall, immediately upon the passage of this Act, appoint a Board of School Directors, consisting of at least five members for each parish of this State, excepting the parish of Orleans, to be composed when practicable, of persons residing in different parts of the parish, who shall hold their office two years from April first, eighteen hundred and seventy-one, or until their successors shall be duly appointed and qualified. And said Parish Boards shall perform all the duties, possess all the rights and privileges, and assume all the obligations of the Ward Boards of School Directors and the School Boards of all cities and towns in the State having a population of less than one thousand persons.

The treasurer of said Parish Board shall perform the duties of secretary, and be entitled to such compensation as the Parish Board may allow out of local or parish school funds, the same not to exceed one hundred dollars per year.

The parish board shall hold their regular meetings on the first Monday in January, April, July and October of each year; they shall convene, at their first regular meeting, on the call of any two of the appointed members, or of the Division Superintendent, and no such meeting shall be held to be legal, unless every member has been duly notified thereof. Special meetings may be held in the same manner. They shall, at their first meeting, organize by electing from their own number a president and a treasurer, who shall be secretary of the board; they shall perform all the duties now required of officers, and not in-

consistent with the provisions of this act. The treasurer of city, town and parish boards shall give bonds in an amount not less than five thousand dollars, the same to be approved by the parish or district judge and the recorder of the parish, and be recorded. Said bonds may, from time to time, be increased by order of the board, or of the district judge, or of the State Superintendent of Public Education, in proportion to the amount of school funds on hand. The board shall, from time to time, examine the treasurer's accounts and settle them.

Sec. 2. Be it further enacted, etc., That the State Board of Education shall immediately appoint a board of school directors for each incorporated town and city of the State (excepting the City of New Orleans) having one hundred or more inhabitants; such boards to number not less than three nor more than five members, who shall hold their office in the manner prescribed by the parish boards. They shall elect a president and treasurer, who shall be secretary of the board, and receive out of the local school fund a salary of not more than one hundred dollars per year. They shall perform such duties as are now required of those officers, and not inconsistent with this act. All incorporated towns or cities having less than one thousand inhabitants shall be provided for by the respective parish boards.

Sec. 3. Be it further enacted, etc., that the corporate authorities of the respective parishes, towns and cities for which boards shall be appointed (excepting the City of New Orleans, shall, once in each year, place upon their annual budget an amount of tax not to exceed two mills on the dollar, nor less than one mill, the same to be levied on the taxable property of the parishes, towns and cities aforesaid; and to be collected at the same time and in the same manner as other taxes, and paid over to the treasurers of said parish, town or city boards of school directors, to be used exclusively for the lease, purchase, building and furnishing of schoolhouses, or for land therefor, and for such other expenses as may be approved by the division superintendent.

Sec. 4. Be it further enacted, etc., that the parish board of school directors shall receive from the hands of parish and ward

boards, and of towns and cities having less than one thousand inhabitants, now organized, all funds and school records in their possession, and such funds shall be applied by the parish boards exclusively to the benefit of the said wards, towns, or cities, and when the electors have voted a tax for school purposes, the parish board shall receive and apply the proceeds to the exclusive benefit of the wards so voting, and of the said towns or cities. And all town and city boards now organized shall likewise turn over such school funds and records to their successors appointed under this act. The new board shall assume all obligations of previous boards superseded by them.

Sec. 5. Be it further enacted, etc., That in any parish, city, or town where a board of school directors fail to establish schools within sixty days after their appointment, or to perform such other duties as are required of them by law, the Division Superintendent for the division in which such delinquent boards are located, may establish schools, and perform as far as possible such other neglected duties, and warrant on the State Treasurer and the treasurers of such boards for the school funds of such parishes, cities and towns, and apply the same for the purposes and in the manner provided by law, each warrant to be approved by the president of the State Board of Education. The Division Superintendent shall act in such cases only until a local board can be found to perform the duties.

Sec. 6. Be it further enacted, etc., that the State Board of Education shall immediately, on the passage of this act, appoint a board of school directors for the City of New Orleans, composed of one member from each Representative District of the city. They shall be divided into three classes, and shall hold office for three years, except that in the case of the board first appointed one-third shall go out in one year, one-third in two years and the remainder at the expiration of three years; the State Board of Education to appoint three members each year after the appointment of the first board, and to fill all vacancies occurring. The board so appointed shall have control of the public schools in the city, and shall be a body corporate and politic. Said board shall employ a secretary at a salary of two

thousand dollars per year, payable on the warrant of the president out of such funds as come into the hands of the board.

Sec. 7. Be it further enacted, etc., That the Board of School Directors for the City of New Orleans shall immediately upon their organization, and also at the commencement of each year thereafter, ascertain the amount of funds necessary to carry on the schools under their charge for the current year, and report the same to the Board of Administrators of the City of New Orleans, who shall, at such time as they may deem necessary, levy the amount on the taxable property of the city, and direct the same to be collected in the manner and at the time by them deemed most desirable, but the time shall not exceed six months from the date of their notification of the amount required.

Sec. 8. Be it further enacted, etc., That the Administrator of Finance of the City of New Orleans shall perform the duties of treasurer of the Board of School Directors for the City of New Orleans as part of his official duties, and shall receive all monies collected for or appropriated to, the Parish of Orleans for school purposes; shall daily deposit the same in the Fiscal Agency of the city, and only pay them out by checks, on the order of the said Board of School Directors; and he shall be ex-officio, a member of the board.

Sec. 9. Be it further enacted, etc., That the division superintendent of the Sixth Division shall have a salary of four thousand ($4000) dollars per annum. He shall be allowed a secretary and one or more messengers, at an expense of not more than twenty-five hundred (2500) dollars per year, payable monthly out of the public school fund, on the warrant of the Division Superintendent of said Sixth Division. The Division Superintendents shall draw their salaries monthly and the State Superintendent quarterly, out of the public school fund, upon their own warrants, and the Division Superintendent shall be allowed an annual contingent fund of six hundred ($600) dollars from the date of their appointments, payable in the same manner.

Sec. 10. Be it further enacted, etc., That the State Superintendent of Public Education shall, quarterly, on the first Monday in March, June, September and December in each

year, apportion the funds raised among the several wards, cities and towns of the State, according to the number of children between the ages of six and twenty-one years within the same. The amount so apportioned shall be paid by the State Treasurer to the treasurers of the respective parish, city and town boards of school directors, upon warrant signed by the president and countersigned by the secretary thereof.

Sec. 11. Be it further enacted, etc., that all acts and parts of acts in conflict with this act are hereby repealed, and that this act shall take effect from and after its passage.

(No. 48 of 1871.) **An Act**

To amend an act entitled, "An act to extend the limits of the Parish of Orleans," etc., approved March 16, 1870, and to prescribe additional regulations for the government of the corporation of the City of New Orleans.

Sec. 9. Be it further enacted, etc., That section twenty-first of said act be amended and re-enacted to read as follows: That all taxes imposed by the City of New Orleans or due to the same and not paid on the thirty-first day of July of each year, shall be exigible with interest at the rate of ten per cent. per annum from that date upon thirty (30) days' notice by the Administrator of Finance (during which delay there shall be three publications in the official journal), in such district courts of the Parish of Orleans as may be designated by the Administrator of Finance, under the direction of the council. And the only process necessary for judgment upon such claims or bills for taxes shall be said publication. Upon the production and filing of said claims or bills, in the appropriate and competent court and the production of proof of publication, judgment shall be immediately rendered in favor of said city, and against the delinquent taxpayer or debtor. It shall be the duty of the Administrator of the Department of Finance to file said bills and proof of publication in the appropriate court immediately after said publication, and to superintend said proceedings under the advice of the City Attorney, and collect the proceeds of the

judgment and writ in the hands of the clerk or sheriff. The clerk of said courts shall be allowed and permitted to charge two dollars for all proceedings had, including judgment and execution in each case filed.

(No. 36 of 1873.) **An Act**

To provide Additional Regulations for the Board of School Directors of the City of New Orleans; to Provide a permanent Revenue for said Schools; to prevent Litigation against the School Fund; to Fund the School Debt; to Regulate the Employment of Teachers, and to direct the Council of the City of New Orleans to levy a School Tax, and perform other duties in connection with the Public Schools.

Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened, that the Board of School Directors for the City of New Orleans shall be in future composed of twenty directors, to-wit: one from each representative district, as at present constituted, and one additional director for each municipal district, the Administrator of Finance for the City of New Orleans, who shall be ex-officio a member, and the Superintendent of the Sixth Division, who shall be ex-officio a member, with the right to speak but not vote in the board. The State Board of Education shall appoint the directors from the municipal districts as soon as practicable after the passage of this act, so that two shall retire annually, the said State Board to determine by lot the succession of their retirement. They shall require the said director to possess the qualifications of an elector in the City of New Orleans and the necessary fitness and capacity for the office, and each new director, before taking his seat, shall take the oath of office prescribed for State officers.

Sec. 2. Bt it further enacted, etc., that as soon as practicable after the passage of this act the Board of Directors for the City of New Orleans shall adopt an estimate of debt and expenditures for the year 1873, and thereafter, during the month (of) October in each year the board shall in like manner adopt and

communicate to the Council of the City of New Orleans an estimate for the year commencing on the first of January next ensuing.

Sec. 3. Be it further enacted, etc., that it shall be the duty of the City of New Orleans to keep in good repair, through the proper department, all school houses, fences, grounds and apartment buildings belonging to the city, and the Council shall see the proper carrying out of this requirement, and make due provision therefor in the budget of current city expenses as a part thereof.

Sec. 4. Be it further enacted, etc., that the Council, after receiving the estimate required in this act for the year 1873, or subsequent years, shall proceed to make provision for the support of public schools in addition to those required in section three of this act, to be made for the preservation of city property. For the purpose of such support it shall levy a tax not less than one-fourth of one per cent. on the taxable valuation of all property in the City of New Orleans, and no provision in any general or special law limiting the aggregate power of taxation of the City of New Orleans, or of the Council, shall prevent the levying of at least one-quarter of one per cent. per annum for school purposes. The tax herein required to be levied for the year 1873 shall be in addition to the taxes levied by the Council in the month of Dec., 1872, and collectible therewith.

Sec. 5. Be it further enacted, etc., that the revenues of the school board for its necessary expenses, and the uses and purposes of the public schools, shall be as follows: The proceeds of the tax of twenty-eight cents on the one hundred dollars levied by the Council of the City of New Orleans for 1872, the annual taxes levied in accordance with this act, the pro rata of State school tax distributed according to sections thirty-four of Act No. 6 of extra session of 1870, any donations, bequests, fines or poll tax received for or accruing to the school fund, and such sum or amount as the City Council may appropriate out of the general funds upon the annual budget, which is hereby authorized, although the same may be raised as a part of the tax for current city expenses; and such sums, if any, as may be

raised upon a vote of the qualified electors authorizing taxation beyond or exceeding the limits laid down by law for taxation not authorized by such election; provided, that appropriations for purchasing landed property or erecting buildings may at the option of the Council making the same, be expended under its control; and provided further, that property and buildings purchased or erected by the school board shall be the property of the City of New Orleans, and only alienable by the consent of the Council, and shall not be subject to seizure for any debt.

Sec. 6. Be it further enacted, etc., that for the purpose of relieving the public schools of the City of New Orleans from pressure of debt, the Council of the City New Orleans is hereby directed to issue new consolidated bonds, general series, at the rate for said bonds of ninety cents on the dollar in favor of all holders of warrants of the school board for the debts for the year 1871 and 1872, who may desire and demand the same. On the delivery of such warrants to the Administrator of Public Accounts of the City of New Orleans, he shall issue his warrant on the Administrator of Finance for the delivery of bonds accordingly.

Sec. 7. Be it further enacted, etc., that no warrant or certificate of any kind shall be hereafter receivable for any school tax, but the school tax shall be payable in cash only; and the Administrator of Finance shall pay out the cash received for the tax of 1872 for the oldest warrants outstanding of 1871 or 1872, so that no warrants of any month shall be paid until those outstanding of previous months are paid or fully provided for, and the cash hereafter received from the State and from other sources, including the school tax of 1873, shall be appropriated for the expenses of each month in turn, beginning January 1, 1873, and no writ of fieri facias or of mandamus shall lie for the seizure of any school moneys in the fiscal agency or treasury of the City of New Orleans or of the school board, or to direct or enforce its paying out, otherwise than in the manner and sequence required by this act.

Sec. 8. Be it further enacted, etc., that the teachers and employes of the Board of Directors of the Public Schools of the

City of New Orleans shall be appointed by said board at such rate of annual salary as may be fixed, and to continue until otherwise ordered by the board; but no annual salary shall be construed as giving a fixed time of employment; and the board may at any time vacate any position by notifying the incumbent thereof. But no school officer, director or committee shall be empowered to remove any teacher, and no position or appointment shall be vacated except by the board at any meeting of the same. And no suit or action shall lie against the Board of School Directors, or against the schol moneys or revenues for the payment of any discharged officer or teacher, the school fund being held sacred for the actual current expenses of the schools. The pay of the regular incumbent, in case of absence from any cause shall be allowed pro rata for actual days employed to the supernumerary or other person temporarily acting. In all suits by or against the Board of Directors of the Public Schools of the City of New Orleans, or by or against the president of the board, or the Administrator of Finance of the city, involving the disposition of moneys raised or to be raised for school purposes, in case the said board, president or Administrator of Finance shall have occasion to appeal, sue out injunction or take other proceedings in which ordinary parties would be required to give bond and security, such bond and security shall be dispensed with.

Sec. 9. Be it further enacted, etc., that there shall be appointed by the Board of Schools Directors a committee on teachers, who shall examine applicants for employment as teachers. The Superintendent of the Sixth Division shall be required to attend and assist at all the examination of said committee. They shall keep a record of the examination of candidates for teachers of all district (intermediate or primary) schools, and such examination in branches of teaching in which they may be practicable, shall be in writing. The original papers shall be preserved, and a figure or estimate affixed to each study, whether the examination therein be written or oral. The aggregate percentage or estimate for each candidate shall be test of proficiency, and the list of candidates shall be preserved for the selec-

tion of teachers by the board, which shall be bound to select for each and any future vacancy from the twenty names standing highest on the list; provided, the committee on teachers shall strike from the list all persons removing from the city, or resigning or declining to be further considered as candidates, and may for cause or reason rendering unfit the employment of the candidate, notwithstanding proficiency, remove his or her name therefrom, and no name shall be stricken from the list by the committee on teachers only as provided for in this act, in case of dismissal of teachers. Teachers in the schools who shall have been examined by the committee or the State Superintendent, and whose percentage or estimate shall place them in the list of candidates to be selected from, shall be duly considered for promotion in all cases of vacancy; and further provided, that nothing in this section shall be construed to prohibit the State Superintendent of Education from issuing to teachers State certificates of qualification.

Sec. 10. Be it further enacted, etc., that the Board of Directors of the Public Schools shall not be empowered to make contracts or debts for the year 1873, or any subsequent year, greater than the amount of the revenue provided for according to this act, or other school laws existing, it being the intent hereof that parties contracting with said board shall take heed that due revenue shall have been provided to satisfy the claims, otherwise they shall lose and forfeit the same, and no action or execution shall be allowed in aid thereof, and that the board shall not exceed its powers in the incurring of debt.

Sec. 11. Be it further enacted, etc., that this act shall take effect from and after its passage, and all laws or parts of laws conflicting therewith be repealed as far as they so conflict.

(No. 41 of 1874.) An Act

To provide the time for the payment and collection of taxes due the City of New Orleans, and to authorize a discount on the same in certain cases.

Sec. 1. Be it enacted by the Senate and House of Represen-

tatives of the State of Louisiana in General Assembly convened, that hereafter and including the taxes for 1874, taxes imposed by the City of New Orleans shall be payable from January 1st to March 31, and shall be exigible from and after the thirty-first day of March in each year.

Sec. 2. Be it further enacted, etc., that the administrators of said city may in their discretion and under such regulations as they may make, grant a rebate or discount on taxes paid in full prior to the twentieth day of a March in each, including the present year; provided, no discount shall be made upon school tax.

Sec. 3. Be it further enacted, etc., that this act shall take effect from and after its passage, and all laws in conflict are repealed.

(No. 49 of 1880.) An Act

Ordering or requiring parish or municipal corporations in the State to receive for taxes or licenses due any parish or municipal corporation prior to January 1, 1879, all valid warrants, scrip or evidence of indebtedness of said parish or municipal corporations.

Section 1. Be it enacted by the General Assembly of the State of Louisiana, that all parish or municipal corporations in this State shall receive for all taxes and licenses due said parish or municipal corporations prior to January 1, 1879, all valid warrants, scrip or evidences of indebtedness of said parish or municipal corporations, except judgments, without any discrimination as to what years said warrants, scrip or evidences or indebtedness shall have been issued; provided, that all valid metropolitan police warrants or scrip for the years 1874, 1875 and 1876 shall be receivable only for that portion of the tax levied for the metropolitan police fund and no other, without any discrimination as to the year in which said warrants were issued or taxes levied, and that all school certificates issued according to law, by any school board shall be receivable for any taxes due any parish or municipality only for that portion to

the school tax due by said parish or municipality. The true intent or meaning of this act being to allow the delinquent tax payers to pay their indebtedness of any year with any kind of valid obligations issued or emitted by any such parish or municipal corporation in this State, with the restrictions above provided, without any discrimination as to the year in which said warrants, scrip or other evidences of indebtedness were issued or the debt contracted; provided, however, that no warrant, scrip or other evidence of indebtedness of any parochial or municipal corporation shall be receivable for any tax or license unless the same shall, after the passage of this act, have first been examined by the police jury of the parish or the municipal authority of the town or city owing the indebtedness, and found valid, and indorsed by them as such; and it shall be the duty of said police juries and municipal authorities throughout the State to pass on the validity of said scrip and other evidences of indebtedness immediately upon the presentation of the same to them; provided, no right to plead prescription shall hereby be waived; and provided further, that all warrants and certificates condemned by the police jury or municipal corporation shall be so stamped.

Sec. 2. Be it further enacted, etc., that all laws or parts of laws contrary to the provisions of this act are hereby repealed.

Constitution of Louisiana, 1879.
Miscellaneous Ordinances.
Relief of Delinquent Taxpayers.

Be it further ordained, that all taxes and licenses due any parish or municipal corporation prior to January 1, 1879, may be payable in any valid warrants, scrip or floating indebtedness of said parish or municipal corporation, except judgments.

Supreme Court of the United States.

No. 46.—October Term, 1900.

The City of New Orleans, Petitioner, vs. John Fisher, Tutor, &c., et al. } On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 28, 1901.]

This was a bill filed by Mrs. M. M. Fisher, joined and authorized by her husband, John Fisher, citizens of the Kingdom of Spain, May 11, 1896, against the city of New Orleans, in the Circuit Court of the United States for the Eastern District of Louisiana, which alleged—

"That she recovered a judgment in this hon. court against the board of school directors, a corporation created by the laws of the State of Louisiana, and a citizen thereof, in the sum of more than ten thousand dollars, as more fully appears by the record of said suit;

"That your oratrix obtained two other judgments against the same school board, before the civil district court for the parish of Orleans, amounting in the aggregate to many thousand dollars;

"That all of said judgments are now final; that they are made payable out of the school taxes levied by the city of New Orleans, prior to 1879.

"Your oratrix avers that the school taxes out of which said judgments have been made payable, is a trust fund levied by the city of New Orleans, for the purpose of paying the expenses of the public schools of the city of New Orleans.

"1st. That the city of New Orleans has failed to collect the said taxes punctually and that it was through her fault and negligence that the same remain uncollected, and by reason of her neglect she has become liable for the amount of taxes yet remaining uncollected.

"2d. Your oratrix further complains and says that said taxes, under the law, carried interest at the rate of ten per cent. per annum and that the city of New Orleans has never paid to the school board any of the interest due on said taxes, but she has misapplied and diverted the same to other unlawful uses.

"3d. Your oratrix further avers that the school board created the obligation against said school taxes, by virtue of contracts which were legally entered into and your oratrix was protected by the Constitution of the United States from any impairment of her contract.

"That in violation of this constitutional right, the State of Louisiana passed act 82 of 1884, which directed that the property of delinquent taxpayers should be sold for what it would bring and that all taxes due thereon should by virtue of said sale be cancelled.

"That by reason of said law, the city of New Orleans allowed the property on which the school taxes were due to be sold for State taxes, and she caused the city taxes, including the school taxes, to be cancelled; that she

was thus guilty, 1st, as a delinquent trustee for not having enforced the collection of the said tax; and 2d, for having failed to protect the interest of your oratrix at said State tax sale; that the cancellations thus made amount to many thousands of dollars.

"4th. That the said city of New Orleans at various times passed ordinances cancelling and annulling the said taxes and remitting the interest thereon:

"That your oratrix is unable to give the exact amount of each kind of violations of her obligations by the trustee, and it is absolutely necessary to make the city of New Orleans account for the various amounts which have been lost to your oratrix through the unfaithfulness of said trustee.

"That the board of school directors to whom the city of New Orleans should account have refused to demand such an account and will continue so to do and your oratrix would be left without a remedy.

"That the fund which the city of New Orleans administers seems now to be sufficient to satisfy the demands of all the creditors who are entitled to be paid out of the same.

"Your oratrix further avers that her judgments are made directly payable out of the school taxes levied prior to 1879 and she has an equitable lien thereagainst enforceable before a court of equity.

"She further avers that under the law her certificates which are merged in her judgments have been under the law, received by the city of New Orleans, directly in payment of the school taxes without the intervention of the board of school directors.

"That for those reasons your oratrix brings her bill against the city of New Orleans and the board of directors of the city schools of New Orleans for an account.

"Your oratrix brings this bill for herself and all parties similarly situated who are willing to appear and contribute to the costs thereof, they being too numerous to be made parties hereto."

The prayer was that the city school board and the city answer, and "give a full, fair and perfect account of all the school taxes collected by the city of New Orleans for the years 1873, 1874, 1875, 1876, 1877 and 1878; of all the interest received thereon by said city and never accounted for; of all the taxes which were not collected for want of proper enforcement, and which have since been cancelled both by sales made by the State tax collectors and by ordinance adopted by the city council;" and for general relief.

Subsequently a supplemental bill was filed in respect of property alleged to have been acquired by the city through seizures for taxes.

The bill was taken as confessed as against the school board and general demurrers were filed by the city, and overruled.

The city thereupon, March 12, 1897, answered, admitting "that oratrix recovered judgments against the board of school directors, a corporation of the State of Louisiana, and a citizen thereof, both in this honorable court and in the civil district court for the parish of Orleans as is set forth in oratrix's bill of complaint and records annexed thereto and referred to therein;" "that all of said judgments are now final and are payable as

decreed and provided for in the said judgments;" but denying "that the school taxes out of which said judgments have been made payable is a trust fund levied by the city of New Orleans for the purpose of paying the expenses of the public schools of said city;" and "that it has ever failed to collect said taxes punctually, and denies that any of the same remain uncollected, and denies that if any of the same remain uncollected, they so remain by reason of any negligence on the part of this defendant, and denies that defendant is liable at all for the amount of any such taxes yet remaining uncollected, if any such there be."

Also admitting "that the city of New Orleans had never paid to the school board any interest which she may have collected on any back taxes, and defendant denies that any such interest, if same has ever been collected, was due to the school board, and defendant denies that she has ever misapplied or diverted to unlawful uses any interest that she may have collected from delinquent taxpayers or back taxes, and defendant avers and shows that by express provision of law all interest which she may collect on any back taxes is especially set aside for certain purposes and cannot by her be used for school purposes or for any other purpose than that commanded by law;" and denying "that the school board created the obligations against the school taxes, set forth in oratrix's bill of complaint, by virtue of any contracts legally entered into, and denies that the oratrix has any right to invoke the protection of the Constitution of the United States herein, and denies that the provisions of the same regarding impairment of contract have been in any manner violated by this defendant;" "that act No. 82 of 1884 was passed in violation of any constitutional rights of oratrix in the premises, and defendant declares that whatever was done by the State of Louisiana in passing the said act, if it was done, was within the legislative authority, and the said taxes and legislative provisions were subject to change, amendment and repeal by the same authority which created them, and defendant shows and avers that the city of New Orleans had no authority or control over the action of the legislature in the premises;" "that the city of New Orleans allowed any property on which school taxes were due, to be sold for said taxes, and denies that she caused the city taxes, including the school taxes, to be cancelled;" "that she has been or is guilty as a delinquent trustee for not having enforced the collection of said taxes, denies that she ever was a trustee in the matter, denies that she ever failed to enforce the collection of any taxes which it was her duty to enforce, denies that it ever was her duty to protect the interests, if any she had, of oratrix, at said tax sales, denies that oratrix had any such interest and denies that there were any such tax sales;" "that any cancellations amounting to many thousands of dollars, or to any amount, were made by reason of said sales as set forth in oratrix's bill of complaint;" "that the city of New Orleans passed ordinances can-

celling and annulling any taxes, or remitting any interest thereon, but if any taxes were so cancelled or remitted, defendant avers the same was done by authority of law or by judgment of a competent court. Defendant denies that there was or is any obligation on the part of the city to account either to the school board or to the oratrix for any taxes, moneys or appropriations such as are set forth in oratrix's bill of complaint."

The answer further denied "that it was the duty of the school board to call this defendant to account, and denies that the school board or the oratrix herein has any cause of action against this defendant for such an account. Defendant denies that there was any privity between the school board and this defendant, or between Mrs. Fisher and this defendant. And further answering defendant says, that if any such cause of action for an accounting ever did exist in favor of said school board or of said oratrix, the same was effective and executory in the year 1880, and became actionable and exigent in the year 1880, and in the years following the year 1873 up to 1879 inclusive; that said action of accounting was personal to said school board and could only be exercised and availed of by the said school board, which action is prescribed by the lapse of ten years from and after each of the said years, and that oratrix has no right or cause of action in the premises;" and "that there is any fund now administered, or which ever was administered by the city of New Orleans, derived either from appropriations, taxes, or money said to be due said school board, and denies that if there is or was any such fund, that the said school board or oratrix has any rights in the premises."

It was admitted "that the judgments of oratrix are payable as stipulated in said judgments," but denied "that oratrix has any equitable lien enforceable against the city of New Orleans before a court of equity by reason thereof;" and also "that under the law were the services which she alleges have been merged in her judgments ever received by the city of New Orleans directly in payment of the school taxes without the intervention of the board of school directors."

The city further denied the purchase of property "for the taxes due for the years during which oratrix's claim is alleged to have arisen;" any resulting trust if purchases had been made; any statutory lien; and "that the oratrix has any right or reason to invoke the equitable jurisdiction of this honorable court."

Replication was filed, and the cause referred to a master "to take a full, true, fair and perfect account of all the funds, principal and interest, received by the city of New Orleans from the school taxes levied in 1871, 1873, 1874, 1875, 1876, 1877 and 1878, and of all interest remitted illegally, and of all properties purchased for said taxes as more fully prayed in the bill and supplemental bill filed herein, and to that effect the parties shall produce before said master all books, papers, documents to be examined and which may be necessary or proper in the premises."

Numerous persons claiming to have judgments against the School Board, similar to the judgments of Mrs. Fisher, intervened and asked to share in the proceeds of any amount found to be due by the city of New Orleans on the accounting. May 22, 1897, the master reported:

"1st. The city of New Orleans owes the school board for the principal of school taxes collected and not paid over from the years 1871 to 1878, both inclusive, the amount of $23,180.03.

"2d. The proportion of the interest actually collected by the city of New Orleans on the taxes of the years 1871 to 1878, both inclusive, up to January 1st, 1897, to which the school board will be entitled, if it is entitled to the same proportion of the interest as of the principal of said taxes, is $48,758.75.

"It is a question of law whether the school board is entitled to any part of the interest. I think it is—the interest as a mere accessory of the principal belongs in my opinion to the same person to whom the principal belongs. Accordingly in my opinion the amount the city of New Orleans now owes to the school board for taxes collected, and for interest on the taxes collected, is as above stated, $71,938.78."

That complainant had abandoned the attempt to show that the city owed anything on account of properties purchased for taxes. That the city was not chargeable "with the calculated amount of interest not collected." And "that the following parties have proved their claims against the fund herein, by judgments rendered in their favor against the school board, in the civil district court for the parish of Orleans, namely:

M. M. Fisher	$11,094 87
"	8,802 39
"	5,864 64
T. J. Gasquet	57,059 69
Jose Venta	21,297 72"

Complainants with several intervenors filed exceptions to the master's report, and on June 7, 1897, the city of New Orleans filed exceptions as follows:

"Defendant excepts to that part of the report of the master wherein he expresses his opinion that the interest on taxes is a mere accessory of the principal, and belongs to the person to whom the principal belongs, and that, therefore, in his opinion, the city of New Orleans owes the school board for taxes collected and interest collected. Exceptor excepts to this on the ground that:

"1st. It was no part of the master's duty, under his reference, to decide this question or to express any opinion upon the question of law involved therein, but in the event that the court overrules this exception and holds that such was his duty, then and in that case the city of New Orleans excepts to his conclusions of law, and asserts that, on the contrary, his conclusion is erroneous; that the interest does not follow the taxes, and does not belong to the party to whom the taxes belong.

"Defendant excepts to the statement of the master that the amount reported as collected out of the school taxes from 1871 to 1878, inclusive, is due by the city to the school board or to the board of liquidation at any time since its collection."

June 29, 1897, the city filed an exception to the jurisdiction of the court *ratione materiæ et personæ*, averring "that plaintiff's petition contains no averment that the suit could have been maintained by the assignors of the claim sued upon by Mrs. M. M. Fisher in the suit which forms the basis of this action;" and on July 1 a plea in abatement "that plaintiff, Mrs. M. M. Fisher, and defendant are both citizens of the State of Louisiana, and that by reason thereof this court is without jurisdiction *ratione personæ*." This exception and plea were afterwards stricken from the files as irregular and not filed in accordance with the rules. The city then offered in open court to file a motion and a plea further attacking the jurisdiction of the court, but leave was refused; and thereafter the case came on for final hearing on the bill, answer, replication, exhibits, proofs and testimony, and master's report.

Included in the evidence offered on behalf of complainant were the pleadings and judgment in the cause of Mrs. Fisher against the School Board, in which judgment was rendered in the Circuit Court, May 19, 1892. The petition in that case alleged that Mrs. Fisher and her husband were "both citizens of the Kingdom of Spain residing in the island of Cuba;" counted upon a judgment against the School Board rendered by the civil district court of the parish of Orleans; and stated that the claim which formed the basis of the judgment was for salary due petitioner as a school teacher of the public schools of the city, and for the salary of other teachers, whose claims had been transferred to petitioner. The defendant filed an exception to the effect that the court was without jurisdiction as the rights, credits and school warrants proceeded on were held by petitioner under assignments, and that the assignors were all citizens of the State of Louisiana and without right to sue defendant in the Circuit Court. This exception was tried before a jury and a verdict rendered in favor of petitioner, whereupon the exception was overruled, and judgment was thereupon rendered in favor of petitioner for $8,097.17, the amount of the judgment rendered in the State court. It appeared that on this judgment garnishee process had been served on the city treasurer and *ex officio* treasurer of the School Board and the sums of $1,893.09 and of $312.56, less costs, realized in 1894, and in 1895.

On February 21, 1898, the court gave judgment in favor of plaintiffs and intervenors, and, among other things, decreed: "That the city of New Orleans, trustee of the special school taxes levied and collected for the years 1871 to 1878, inclusive be condemned to pay plaintiffs and intervenors the said taxes, received and collected by her, as follows: $71,938.78 with five per cent. interest per annum on $71,139.60 from January 24th, 1881, and on $799.18 from May 11th, 1896, until paid. And it is further ordered that this bill be retained for a further accounting and such orders and decrees as may be necessary."

Mrs. Fisher died February 25, 1898, and on April 22, 1898, John Fisher was made party complainant as natural tutor of his minor children. April 23, 1898, the city filed a petition for rehearing which was denied, but the court directed the final decree to be amended so as to only allow interest on the amount recovered, to wit: $71,139.60 from February 21, 1898, the date of said decree, instead of from January 24, 1881, as theretofore allowed. On the same day, April 23, and prior to the decision on the rehearing, a plea in abatement was put in by the city to the effect that John Fisher, being a citizen of Spain, was unable to prosecute the suit, and that it should be abated because a state of war existed between Spain and the United States, and the subjects and citizens thereof. On the proofs the court was satisfied that complainant was a citizen of Great Britain, whereupon the plea was overruled. From the decree of the Circuit Court both parties appealed to the Circuit Court of Appeals for the Fifth Circuit, which modified the decree so as allow five per cent. interest on the sum of $71,139.60 from January 24, 1881, and on the sum of $799.18 from May 8, 1897, and as so modified the decree was affirmed with costs. 91 Fed. Rep. 574.

The city applied to this court for the writ of certiorari, which was granted.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Fourteen errors were assigned in the Circuit Court of Appeals, which were considered and disposed of *seriatim*. Many of these alleged errors raised questions not within the exceptions to the master's report, and, in any view, we think the case may be determined without minutely retraversing the ground.

Mrs. Fisher and her husband recovered judgment against the board of school directors in the State District Court, May 22, 1890, which, on appeal, was affirmed by the Supreme Court. *Fisher and Husband* v. *School Directors*, 44 La. Ann. 184.

February 23, 1892, Mrs. Fisher and husband brought an action against the school board on the judgment so recovered, in the Circuit Court of the United States for the Eastern District of Louisiana. The petition set forth that Mr. and Mrs. Fisher were citizens of the Kingdom of Spain, and that the judgment sued on was recovered on certain claims for school teachers' salaries, including Mrs. Fisher herself. An exception was filed to the jurisdiction of the court on the ground that the assignors of the school warrants held by Mrs. Fisher as assignee could not have sued in that court. The matter was submitted to a jury, and a verdict returned in plaintiffs' favor, whereupon the exception was overruled, and afterwards the case went to judgment payable out of the school taxes levied prior to 1879. This judgment was rendered May 19, 1892, and on May 11, 1896, the present bill, in the nature of a creditor's bill, was filed on behalf of

Mrs. Fisher, joined and authorized by her husband, (setting up that judgment and others,) and of all others similarly situated, to compel an accounting for their benefit by the city in respect of the school taxes levied prior to 1879, and the interest thereon, collected and not paid over to the school board, as a trust fund for the payment of the expenses of the public schools, it being averred that the school board had refused to require such accounting.

After demurrer filed and overruled, the city answered, admitting the recovery of the judgments as alleged; that they had become final; and that they were payable as provided therein; and denying that the school taxes collected constituted a trust fund; any liability for interest collected; any privity between Mrs. Fisher and the city; and pleading prescription by the lapse of ten years.

The cause was referred to a master, who reported certain amounts of school taxes, and of interest on school taxes, collected by the city. The city filed exceptions to the conclusions of the master that the city was indebted to the school board for interest collected; and that the amount reported as collected out of the school taxes from 1871 to 1878, inclusive, was due by the city to the school board "at any time since its collection."

The facts are not in controversy, and the questions raised, or attempted to be raised, are questions of law.

The bill invoked the ordinary exercise of equity jurisdiction in this class of cases. The school taxes collected were held in trust by the city, and, as the school board declined to require an accounting, these creditors, whose claims were payable out of the taxes, were entitled to the interposition of a court of equity to reach the fund. The suggestion of want of privity between complainants and the city, as defeating the jurisdiction, is without merit. Nor is the defense of the statute of limitations well founded. The judgments were rendered since 1890, and were made payable out of these taxes; the school certificates were merged in these judgments; and this bill was filed within ten years.

As between the city and the school board, the city did not hold these collections in her own right. The possession of the one was the possession of the other; the possession of the city was precarious, and not *animo domini;* and being trustee she could not acquire the trust fund by lapse of time. There was no adverse possession in repudiation of the fiduciary relation. *Oliver* v. *Piatt*, 3 How. 411; *New Orleans* v. *Warner*, 175 U. S. 120.

After the master's report and the exceptions thereto had been filed, the city undertook to raise the question of the jurisdiction of the Circuit Court on the ground of the want of competency in the assignors of Mrs. Fisher to sue in that court, and of want of diversity of citizenship between Mrs. Fisher and the city. The first of these objections had been made and after

trial overruled in the proceedings which resulted in the judgment of May 19, 1892. The petition in that case also alleged that Mrs. Fisher and her husband were citizens of Spain. The judgment was conclusive on both points, and not open to impeachment as to either collaterally or on a creditor's bill. *Mattingly* v. *Nye*, 8 Wall. 373; *Evers* v. *Watson*, 156 U. S. 533; *Laing* v. *Rigney*, 160 U. S. 539.

On July 1, 1897, a plea to the jurisdiction of the court in this case because Mrs. Fisher was a citizen of Louisiana was put upon the files without leave of court, and was stricken off as irregular on December 20. This action of the court is not open to review, and as this bill was merely ancillary the plea was immaterial. *Root* v. *Woolworth*, 150 U. S. 413.

The city on the same day, December 20, applied for leave to file a plea alleging that Mrs. Fisher was a citizen of Louisiana at the time the original action was brought in the Circuit Court, and had so continued down to the filing of the bill; that she had fraudulently otherwise represented; and that the city had no information of the facts until after the exceptions to the master's report were filed, which was on the seventh of June. This application was denied by the Circuit Court, and it is impossible for us to say that in this ruling the court abused its discretion.

This was not the proper way to attack the original judgment on the ground of fraud; nothing was said in the proposed plea as to the citizenship of Mr. Fisher, who was a party plaintiff, and a necessary or at least proper party, if the choses in action sued on were community property, and even if paraphernal, La. Civ. Code, §§ 2402, 2404, 2385; and the record, so far from indicating fraud, showed that Mr. Fisher was an alien, being a subject of the British crown residing at Cuba, which had led to a mistake of counsel in framing the pleadings.

It may be added that there was nothing in the case bringing it within the exceptional rule applied in *Lawrence Man. Co.* v. *Jonesville Cotton Mills*, 138 U. S. 552, relied on by counsel.

The city excepted to the inclusion of the interest on school taxes collected by the city with the school taxes collected, as part of the amount, for which the city was liable.

The Circuit Court of Appeals disposed of this point in these words:

"Under the law, the school taxes carried ten per cent. interest per annum from the day they became delinquent. It was a penalty for non-payment of the taxes. This interest, or penalty, for delayed payment of school taxes, formed no part of the city's proper revenues. The city in collecting the same was acting as a trustee for the school board. Delay in payment of taxes operated to the prejudice, not of the city, but of the school fund and its creditors. We are unable to find any authority in law or morals for the city to appropriate to itself this interest. To allow such an appropriation would be to reward the city for its own negligence in the collection of the taxes due the school fund. We fully agree with the master that 'the interest, as a mere accessory of the principal, belongs to the same person to whom the principal belongs.'" 91 Fed. Rep. 583.

We concur in this view, and are moreover of opinion that the city, having made such collections, cannot now be permitted to escape liability therefor on the suggestion that school taxes are not within the terms of the statute inflicting the penalty on "all taxes imposed by the city of New Orleans." (Acts La. 1871, No. 48, sec. 9.)

The only other matter necessary to be referred to is the allowance of interest. The Circuit Court by its amended decree gave interest on the larger sum found due from the date of the decree. The Circuit Court of Appeals modified that decree so as to award interest on the sum of $71,139.60, collected prior to January 24, 1881, from the latter date, and on the item of $799.18, reported by the master May 8, 1897, as having been collected after January 24, 1881, from the date of the report.

The bill did not charge the city with any wilful default, nor did it appear therefrom when the school board was requested to demand an accounting. The bringing of the bill amounted to such demand, and it was filed May 11, 1896, and the appearance of the city entered June 1.

The city occupied the position of agent of the school board to collect and pay over school taxes, as held in *Labatt* v. *New Orleans*, 38 La. Ann. 283, yet it may fairly be said that, under the legislation upon the subject, it was not the duty of the city to pay the money over immediately, but only as occasion might arise, and that, as no charge of fraudulent conversion was made, interest would not commence to run until after failure to pay when required to do so, or failure to account on demand.

Where interest is sought by way of damages for delay, courts of equity exercise a certain discretion as to its allowance.

In view of the acquiescence of the school board in the retention by the city of the interest collected on school taxes, an acquiescence in good faith so far as appears; the attitude of the city as a public corporation; and the lack of averment or evidence of demand prior to the filing of the bill, or of effort to compel an accounting, we think that interest should not be allowed in this case prior to May 11, 1896.

The decree of the Circuit Court of Appeals is modified so as to provide for five per cent. interest on the sum of $71,139.60 from May 11, 1896, and on the sum of $799.18 from May 8, 1897, and as so modified is affirmed with costs; and the cause is remanded to the Circuit Court with a direction to amend its decree in the particulars above specified, it being affirmed as so modified.

Mr. Justice PECKHAM and Mr. Justice MCKENNA took no part in the consideration and disposition of the case.